92-594

Supreme Court, U.S.
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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

EARLE A. PARTINGTON and
CLIFFORD M.M. CLARKE, SR.,

Petitioners,

v.

GERALD H. KIBE, CHARLENE M. NORRIS, and
STATE OF HAWAII,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state supreme court violate the Sixth Amendment strong presumption of effectiveness and right of independence of counsel and/or the Fourteenth Amendment right to due process of law by

(1) *sua sponte* adjudicating, without notice or hearing, that a criminal defense attorney rendered ineffective assistance of counsel when, as a matter of law, the appellate record in the criminal case does not establish ineffective assistance by the attorney, and

(2) then subjecting the attorney to duplicative, successive attorney-disciplinary proceedings expressly premised *solely* upon the court's ineffectiveness adjudication?

LIST OF PARTIES

The petitioners in this case are:

EARLE A. PARTINGTON, a criminal defense attorney

CLIFFORD M.M. CLARKE, SR., the defendant and Partington's client at trial and on appeal in *State v. Clarke,* Haw. S. Ct. No. 10041

The respondents in this case are:

GERALD H. KIBE, Chief Disciplinary Counsel of the Office of Disciplinary Counsel of the Supreme Court of Hawaii

CHARLEEN M. NORRIS, Assistant Disciplinary Counsel of the Office of Disciplinary Counsel of the Supreme Court of Hawaii

STATE OF HAWAII, the plaintiff in *State v. Clarke,* Haw. S. Ct. Nos. 10041 and 10063

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Respondents.

Petition For Writ Of Certiorari To The Supreme Court of Hawaii

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Hawaii entered on July 9, 1992, in *State v. Clarke*, Haw. S. Ct. Nos. 10041 and 11633, which order denied Petitioner Partington's Motion to Vacate and Modify Memorandum Opinion of December 27, 1985 (in No. 10041), and to vacate Judgment and Modify Memorandum Opinion of October 5, 1987 (in No. 11633), and for Writ of Prohibition Directed to Chief Disciplinary Counsel Gerald H. Kibe and Assistant Disciplinary Counsel Charlene

M. Norris of the Office of Disciplinary Counsel of the Supreme Court of Hawaii.

OPINIONS BELOW

The order of the Supreme Court of Hawaii entered on July 9, 1992 (*see* 1a-2a), is unreported. The opinion of the Supreme Court of Hawaii which was the subject of Partington's motion was entered on December 27, 1985 (*see* 3a-5a), and is unreported. The orders of the Supreme Court of Hawaii interpreting the December 27, 1985, opinion were entered on September 24, 1990 (*see* 6a-8a), and October 11, 1990 (*see* 9a-11a), and are unreported. Petitioner Partington's unsuccessful attempts to seek collateral review of the December 27, 1985, opinion and the first of two attorney disciplinary proceedings against him predicated upon that opinion are reported as *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3302 (1990) – (*"Partington I"*) (*see* 12a-94a) and *Partington v. Gedan*, 961 F.2d 852 (9th Cir. 1992), *cert. pet. pending* (*"Partington IV"*).[1]

BASIS FOR JURISDICTION

The order of the Supreme Court of Hawaii denying Petitioner Partington's motion for relief was entered on July 9, 1992 (*see* 1a-2a), and is a final judgment or decree as the order expressly provides that no further filings

[1] *Partington IV* is not reprinted in the appendix because further reference thereto is unnecessary.

shall be accepted by the court in this matter (*see* 1a-2a). This Court has jurisdiction to review a final judgment or decree of a state's highest court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES OF COURT

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

United States Constitution, Amendment XIV:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law. . . .

Hawaii Supreme Court Rule 2: *see* 201a-235a.

Hawaii Supreme Court Rule 13: *see* 236a-238a.

STATEMENT OF THE CASE

In 1984 Petitioner Partington was appointed to represent Petitioner Clarke in *State v. Clarke* in the Circuit Court of the First Circuit, State of Hawaii. Clarke was charged with first degree murder for the brutal, and eventually fatal, abuse of his girlfriend's three-year-old daughter. *Partington I*, 880 F.2d at 117; 14a. Partington has been an attorney since 1969 and is a former federal defender in San Diego, a former assistant federal public

defender in San Francisco, and a former deputy prosecuting attorney in Honolulu (Haw. S. Ct. No. 10041 Record (hereinafter "R") at 337). Clarke's trial and sentencing were highly publicized in the media.

During the trial, Partington made no opening statement (111a-114a) and, for the purpose of impeachment, asked three prosecution witnesses if it were true that they believed that Clarke was guilty and thus were testifying in order to convict him (121a-122a). There was no direct evidence of Clarke's guilt, and the child's mother had previously been in state family court for neglect and possible abuse of the child, as set out in the Statement of the Case in Clarke's Opening Brief (R 97-114). Partington's pretrial motion to the family court for discovery of these confidential court records was denied (114a; R 104). Partington renewed his discovery motion in the family court on a Wednesday and it was heard in family court that same day, during a recess in the state's case in Clarke's circuit court trial (114a). At the hearing on the discovery motion, the family court reversed itself and ordered discovery (114a). However, based on the prosecutor's representation that the child's mother would not be called by the state in the circuit court trial until late in the day two days later (a Friday), the family court delayed releasing the discovery until the following Monday in order to review it first (114a). However, the following morning (Thursday) in circuit court the prosecutor called the child's mother as a prosecution witness (115a), claiming the prosecution had changed its mind overnight (R 104).

After the prosecutor finished direct examination that same morning, Partington informed the circuit court that

the defense was reserving cross-examination until after the family court discovery was provided the following Monday (R 105). The circuit court refused to permit the defense to reserve cross-examination and directed Partington to cross-examine the child's mother at that time or not at all (115a; R 105). The circuit court further informed the defense that if it refused to cross-examine immediately, it would be limited to calling the child's mother as its own witness and cross-examination would not then be permitted (R 105, 109). Partington refused to cross-examine at that time (115a) and subsequently did not include the child's mother among the several defense witnesses called. At the time for closing argument, Partington informed the circuit court in the presence of both the jury and Clarke that, in view of the court's ruling on cross-examination of the child's mother, both he and Clarke felt that closing argument would be a waste of time; no closing argument was given by the defense (122a-126a). Clarke was convicted as charged (R 113).

The trial judge said nothing at trial or sentencing about the defense tactics, but, after Clarke was found guilty and sentenced and the appeal was pending, the trial judge complained to the Office of Disciplinary Counsel (ODC) of the Supreme Court of Hawaii that Partington had been deliberately ineffective in refusing to give a closing argument (R 113). Partington properly informed Clarke of the complaint, and Clarke wrote to the circuit court requesting a court hearing on the complaint (R 44-45); Clarke acknowledged in the letter that he had consented to waiving closing argument as a trial tactic (R 44-45). Partington, who continued on appeal as Clarke's court-appointed attorney, then moved the

Supreme Court of Hawaii on behalf of Clarke to remand the case to the circuit court for a hearing on the trial judge's complaint (R 29-46). The Supreme Court of Hawaii denied this motion (R 49).

In Clarke's opening brief in the Supreme Court of Hawaii (R 86-218), Partington raised fifteen issues under nine argument headings, which issues included prosecutorial misconduct (above and beyond that set out above), judicial impropriety, and numerous erroneous rulings by the trial judge (R 114-15). No claim of ineffective assistance of counsel was then made, and at no time has Clarke ever accused Partington of rendering ineffective assistance of counsel. *Partington I*, 880 F.2d at 123; 28a-29a. The appellate record was void as to the reasons for Partington's trial tactics except for (1) Clarke's letter requesting a hearing (R 44-45) and (2) Partington's statement to the trial judge that it would be incompetent to cross-examine the child's mother without first obtaining the requisite discovery (R 105). However, at oral argument on the appeal, one of the justices of the Supreme Court of Hawaii accused Partington of having deliberately rendered ineffective assistance of counsel to Clarke at trial – an allegation that both Partington and the prosecutor denied during the argument (880 F.2d at 118; 14a).

Notwithstanding that Partington's trial tactics are all legitimate trial tactics in an appropriate case (110a-126a), the Supreme Court of Hawaii, on December 27, 1985, in an unpublished opinion and without addressing any of the fifteen issues raised by Clarke, reversed Clarke's murder conviction holding *sua sponte* that *any* one of the following actions by Partington in Clarke's trial, *standing alone*, constituted ineffective assistance of counsel: (1) the

refusal to make an opening statement, (2) the refusal to cross-examine the child's mother the day she testified, (3) the refusal to call the child's mother as a defense witness; (4) the eliciting from two prosecution witnesses that they believed Clarke was guilty, and (5) the refusal to make a closing argument (3a-5a). Clarke was subsequently retried and reconvicted of murder, and his conviction affirmed (in Haw. S. Ct. No. 11633), new counsel having been appointed for Clarke as Partington was at Tulane University obtaining a graduate law degree (R 337-38).

The reversal of Clarke's conviction automatically triggered a special disciplinary proceeding against Partington (5a), pursuant to Hawaii Supreme Court Rule (HSCR) 13 (for text, 236a-238a). HSCR 13 provides for "proceedings following final adjudication of ineffective assistance of counsel in criminal cases." HSCR 13 proceedings are conducted before a special master within and as a part of the criminal appeal in the Supreme Court of Hawaii under the appeal case number (here Haw. S. Ct. No. 10041). Clarke then invoked the attorney-client privilege to silence Partington (R 788-89; 880 F.2d at 123-24; 28a-31a). Partington refused to cooperate in the proceeding, claiming that the ineffectiveness adjudication and HSCR 13 proceeding violated his federal constitutional rights under the free speech, right to counsel, due process, and equal protection clauses (HSCR 13 7/9/90 Motions and Transcript (hereinafter "7/9/90 Tr") at 10:22-35:6).

Partington's motion during the HSCR 13 proceeding for interlocutory review of his constitutional claims by the Supreme Court of Hawaii was denied (R 378-79).

Clarke's objection to the HSCR 13 proceeding against Partington was referred by the Supreme Court of Hawaii to the HSCR 13 special master (R 1228-29), who rejected it on the ground that Clarke lacked standing to object or participate (7/9/90 Tr 41:6-42:2). Neither Clarke nor Partington testified at the hearing, and the record therein was *identical* to that which was before the Supreme Court of Hawaii at the time of the 1985 ineffectiveness adjudication against Partington. The hearing was purportedly de novo on the ineffectiveness issue, and at its conclusion the special master held that the Sixth Amendment strong presumption of effectiveness does *not* apply to attorney disciplinary proceedings and that Partington's refusal to cooperate mandated a presumption of *in*effectiveness resulting in a finding against Partington (*see* "Decision & Order" of Special Master, 7/31/90, not paginated in Record). Partington filed extensive exceptions raising, inter alia, the constitutional issues raised here (R 1369-1497).

On review in September 1990, the Supreme Court of Hawaii refused to address the federal constitutional issues raised by Partington, but nonetheless ruled in Partington's favor and dismissed the HSCR 13 proceeding after rejecting the master's findings in their entirety (6a-8a). As clarified in October 1990 (upon the special prosecutor's motion for reconsideration), the court again held that HSCR 13 proceedings are not de novo on the ineffectiveness issue as that issue was finally adjudicated in the reversal of the criminal conviction (9a-11a). Partington's prior collateral attack in the federal courts, pursuant to 42 U.S.C. § 1983 on the ineffectiveness adjudication and on the HSCR 13 proceeding had been

defeated by *Younger* abstention and immunity based in part on misrepresentations from the HSCR 13 special master and justices of the Supreme Court of Hawaii to the federal courts that HSCR 13 proceedings are de novo on the ineffectiveness issue. *Partington I*, 880 F.2d 116; 12a-94a.

In July 1991, pursuant to HSCR 2 (which regulates ordinary attorney disciplinary proceedings) (for text, see 201a-235a), ODC initiated an attorney disciplinary proceeding against Partington based on the 1985 ineffectiveness adjudication and identical in scope and subject matter to the HSCR 13 disciplinary proceeding. The 1985 ineffectiveness adjudication and the HSCR 13 special master's finding against Partington (based upon a presumption of *in*effectiveness) are expressly pleaded in the petition initiating this second disciplinary proceeding and are the *sole* bases for the proceeding (158a-169a). Unlike HSCR 13 proceedings, HSCR 2 proceedings are not original proceedings in the Supreme Court of Hawaii (208a-212a). In HSCR 2 proceedings, the trial level (i.e., the hearing committee) and the first level of appeal (i.e., the Disciplinary Board) have no jurisdiction to decide constitutional issues; only the Supreme Court of Hawaii as the second and final review level has such jurisdiction (144a).

On June 19, 1992, Partington moved the Supreme Court of Hawaii in *State v. Clarke*, Haw. S. Ct. Nos. 10041 and 11633, to vacate the 1985 ineffectiveness finding against Partington (and delete the reference to it in the court's opinion in the second appeal) and to enjoin respondents Kibe and Norris from maintaining the HSCR

2 proceeding against Partington based solely on the ineffectiveness adjudication or the HSCR 13 special master's finding (95a-200a). Clarke – who is not a party to, and has no right to relief in, the HSCR 2 proceeding – joined in Partington's motion (R 1718-21). As to both Clarke and Partington, the Supreme Court of Hawaii is the state court of first and last instance in this matter.

Partington's motion in the Supreme Court of Hawaii raised the federal constitutional questions that are again raised here (110a-152a). First, Partington showed that, as a matter of law, each of the five tactics in question is well established as legitimate trial tactics and that, as to some of them, it is defense counsel alone who decides whether to employ the tactics (110a-126a). Next, Partington pointed out that the *sua sponte* adjudication of ineffectiveness by the state supreme court denied him due process, both as to the adjudication itself and as to any subsequent disciplinary proceeding predicated on that adjudication (126a-132a). Partington cited extensive federal and state authority stating that ineffective assistance of counsel may not be raised for the first time on appeal because the record is invariably inadequate to decide such an issue not raised below (132a-134a). Partington then argued that the second, duplicative attorney disciplinary proceeding against him not only violated the Sixth Amendment strong presumption of effectiveness and right of independence of counsel (134a-139a), but also was the kind of intrusive post-trial inquiry prohibited by the Sixth Amendment (139a-143a). Finally, Partington argued that respondents Kibe and Norris were attempting to usurp Clarke's Sixth Amendment right to the effective assistance of counsel (150a-152a).

On July 9, 1992, the Supreme Court of Hawaii denied all relief without explanation and firmly stated that further filings in *State v. Clarke*, Haw. S. Ct. Nos. 10041 and 11633, would not be permitted (1a-2a). The HSCR 2 proceeding against Partington is presently pending with the hearing set for February 1993.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to decide whether the Sixth Amendment strong presumption of effectiveness and right of independence of counsel and/or the Fourteenth Amendment right to due process of law protect the criminal defense attorney from a court's *sua sponte* adjudication of ineffective assistance of counsel without notice or hearing where, as a matter of law, the appellate record in the criminal case does not establish ineffectiveness.

This case presents the important question of whether a state supreme court violates the Sixth Amendment strong presumption of effectiveness and right of independence of counsel and/or the Fourteenth Amendment right to due process of law by *sua sponte* adjudicating, without notice or hearing, that a criminal defense attorney rendered ineffective assistance of counsel when, as a matter of law, the appellate record in the criminal case does not establish ineffectiveness. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court recognized that from the Sixth Amendment right-to-counsel clause arise a "constitutionally protected independence of counsel" and "a strong presumption" that defense counsel effectively represented an accused in a criminal case. 466 U.S. at

688-89. However, this Court did not address, and has never addressed, to whom these Sixth Amendment rights belong, who may assert them, and to what extent they protect a criminal defense attorney from harassment and damage or destruction to counsel's livelihood.

In *Strickland* (as in the typical case of an ineffective assistance claim), the government asserted, to the detriment of the accused, both the presumption of effectiveness and the right of independence of counsel. Consequently, these rights in *Strickland* were *not* the rights of the accused (and certainly the government has no Sixth Amendment rights), which leads to the conclusion that the rights in question belong to Strickland's counsel, who was not a party to the case and thus was unable to assert his own rights. Certainly, if the government may assert the rights of defense counsel, then defense counsel may assert his own rights when he is a party to the proceeding. Moreover, as the Sixth Amendment expressly vests rights in an accused, it is clear that an accused may, in an appropriate case, assert these rights as well.

The remaining question is the scope of protection these rights provide in a criminal appeal such as *State v. Clarke* where (1) a claim of ineffective assistance of counsel is made by someone other than the accused, (2) the accused has *never* made a voluntary, knowing, and intelligent waiver of the attorney-client privilege, (3) the appellate record is void as to the reasons for defense counsel's trial tactics and (4) none of defense counsel's acts and omissions constitutes ineffectiveness per se. This question is critical in the context of the instant case where the rights of the accused are purportedly vindicated by

the reversal of his conviction, but the criminal defense attorney is the one who suffers the devastating consequences of the reviewing court's decision when the decision is made without notice or hearing to counsel and without the slightest knowledge of whether it is justified on the facts of the case.

The defense in a criminal case is under no obligation to assist the prosecution in having its evidence admitted or to undo the effect of an earlier erroneous ruling to which a proper objection has been interposed. *United States v. Miller*, 884 F.2d 1149, 1151 (9th Cir. 1989); *United States v. Hashimoto*, 878 F.2d 1126, 1134-35 (9th Cir. 1989); *United States v. Heinel*, 9 U.S.C.M.A. 259, 262, 26 C.M.R. 39, 42 (1958). Yet, Partington was adjudicated ineffective for not assisting the prosecution even though such assistance would have violated his duty to Clarke. In reality, competent defense attorneys try to get reversible error into the record in criminal cases, and there is nothing improper with such efforts as long as they are not corrupt. *Ratnor v. Young*, 465 F. Supp. 386, 395 (D.V.I. 1979). The effect of the 1985 *sua sponte* final adjudication of ineffectiveness against Partington is to abrogate these rules and put criminal defense counsel in Hawaii on notice that their trial tactics will be second guessed to ensure that they do *not* legitimately take advantage of prosecutorial misconduct and judicial overreaching to benefit their clients. No longer may the defense choose its strategy and tactics in a criminal case confined only by the law and the Hawaii Code of Professional Responsibility, but such decisions must also be "politically correct" so as not to offend the Supreme Court of Hawaii's idea of how a criminal case *should* be defended.

The question of whether the defense attorney's Fourteenth Amendment right to due process of law is violated by the *sua sponte* adjudication of ineffectiveness arises because HSCR 13 (*see* 236a, first paragraph) mandates a special proceeding against the attorney. The Supreme Court of Hawaii has held that the ineffectiveness adjudication is res judicata and may not subsequently be relitigated (6a-11a). In *Withrow v. Larkin*, 421 U.S. 35, 57-58 (1975), this Court discussed just such a fact situation and said that "a substantial due process question would be raised" if an adversarial proceeding were conducted where the ultimate issue was res judicata by virtue of prior "nonadversarial processes." This due process issue has two aspects. The first relates to whether the nonadversarial process violates due process because the decision (such as the *sua sponte* ineffectiveness adjudication here) is thereafter res judicata. The second relates to whether the adversarial proceeding (such as either of the attorney disciplinary proceedings here) violates due process because the critical issue was finally adjudicated in the prior nonadversarial process and, being final, may not be relitigated. (The second aspect will be discussed under the second point.)

In *Caplin & Drysdale, Chartered v. Monsante*, 491 U.S. 617, 647 (1989), Justice Blackmun, dissenting, recognized that there is a place in the criminal justice system for the defense attorney who is a maverick and risk-taker and for defenses that might displease some judges. The courts have a duty to protect such attorneys from actions which improperly "chill an attorney's enthusiasm or creativity

in pursuing factual and legal theories."[2] *In re Yagman*, 796 F.2d 1165, 1182 (9th Cir. 1989). What the Supreme Court of Hawaii did to Partington is to claim the power to drive the maverick attorney, be he completely ethical, from criminal practice and force a strait-jacket of conformity inhibiting the criminal defense bar. This is nothing less than the power to abrogate the Sixth Amendment right to counsel.

II. Certiorari should be granted to decide whether the Sixth Amendment strong presumption of effectiveness and right of independence of counsel and/or the Fourteenth Amendment right to due process of law is violated by subjecting a criminal defense attorney to duplicative, successive disciplinary proceedings expressly premised *solely* upon the previously discussed ineffectiveness adjudication.

The second important issue presented here is whether the Sixth Amendment strong presumption of effectiveness and right of independence of counsel and/or the Fourteenth Amendment right to due process of law

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[2] At the motions hearing in the HSCR 13 proceeding (*see* 7/9/90 Tr), four prominent criminal defense attorneys (including the Federal Public Defender) testified to the chilling effect the actions of the Supreme Court of Hawaii against Partington had had on the criminal defense bar, as well as to the fact that the record did not establish that Partington had rendered ineffective assistance of counsel because it was unclear why Partington did what he did (the record being void as to the reasons) and bona fide reasons for Partington's tactics may well have existed. The testimony of those four attorneys has *never* been contradicted. The extensive record of the HSCR 13 proceeding is part of *State v. Clarke*, Haw. S. Ct. No. 10041.

is offended where a criminal defense attorney is subjected to duplicative, successive attorney disciplinary proceedings expressly promised *solely* upon the previously discussed ineffectiveness adjudication. In *Strickland,* this Court condemned intrusive post-trial inquiries into defense counsel's conduct:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. *Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.*

466 U.S. at 690 [emphasis added]. In *Strickland,* it was the intrusive nature of the post-trial inquiry that offends the Sixth Amendment. The fact that the inquiry affords the defense attorney an opportunity to defend himself is irrelevant to that issue because the focus is on the nature of the inquiry and not on the due process rights of the defense attorney. However, where the defense attorney is subjected to an intrusive post-trial inquiry without an opportunity to defend himself, then issues under both the Sixth and Fourteenth Amendments are raised. This is the exact situation here: Partington was *sua sponte* and wrongfully adjudicated ineffective and was sent through one attorney disciplinary proceeding without any right to

contest the adjudication, and he is now being subjected to a second disciplinary proceeding in which that adjudication is the predicate for the proceeding, the scope of which is identical to the first proceeding.

While evading Partington's repeated constitutional objections by refusing to rule on them, the Supreme Court of Hawaii had no difficulty in subjecting him to two intrusive post-trial inquiries (the two disciplinary proceedings) for his constitutionally protected conduct. However, for other criminal defense attorneys in Hawaii who have not displeased the Supreme Court of Hawaii, such proceedings would be "unfair" because the attorney must be given an opportunity "to explain his side of the story" in a nondisciplinary hearing in the trial court *prior* to any ineffectiveness adjudication. *Matsuo v. State*, 70 Haw. 573, 578, 778 P.2d 332, 335 (1989).[3] Further, the Supreme Court of Hawaii has never explained how it or its agents acquired standing to assert Clarke's Sixth Amendment right to the effective assistance of counsel, a right Clarke has never asserted against Partington and now expressly refuses to assert.

Partington was not only finally adjudicated to have rendered ineffective assistance of counsel without notice or hearing and without any basis in the record for such an adjudication, but his ethical duty to his client, Clarke, prevented him from seeking to have the adjudication

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[3] The Supreme Court of Hawaii also amended its rules relating to post-conviction relief proceedings in 1989 to mandate that defense counsel be given an opportunity to be heard prior to an ineffectiveness adjudication in such a proceeding. Rule 40(f), Haw. R. Pen. P.

overturned and Clarke's conviction reinstated in 1985. When that adjudication triggered the HSCR 13 proceeding, Partington was denied collateral relief in the federal courts by the state officials' misrepresentation that the HSCR 13 proceeding would be conducted de novo on the ineffectiveness issue. When the HSCR 13 proceeding was finally reviewed in 1990, the Supreme Court of Hawaii held that the proceeding was not de novo on the ineffectiveness issue, but it terminated the proceeding in Partington's favor by rejecting the special master's finding and dismissing the proceeding. As the prevailing party, Partington had no avenue of direct review of the ineffectiveness adjudication or for having been subjected to a patently unconstitutional disciplinary proceeding.

When Clarke challenged the HSCR 13 proceeding, the Supreme Court of Hawaii sent him to the special master who ruled that Clarke had no standing to participate or object. Partington's motion for interlocutory review of the constitutional issues raised by the ineffectiveness adjudication and the HSCR 13 proceeding was denied. Within months after the termination of the HSCR 13 proceeding, the Office of Disciplinary Counsel brought a second disciplinary proceeding against Partington for which the Supreme Court of Hawaii denies all interlocutory review, even on the fundamental issue of whether a criminal defense attorney may be subjected to a disciplinary proceeding on these facts. The Supreme Court of Hawaii has repeatedly refused to address the constitutional issues raised by Partington. Clearly, the court will never address these issues for the court would then be forced to acknowledge that it had no basis for its *sua sponte* ineffectiveness adjudication against Partington.

The 1985 ineffectiveness adjudication is, therefore, beyond review outside this Court.

This Court should define the relationship between the Sixth Amendment right to counsel clause and the Fourteenth Amendment due process clause to provide appropriate protection to criminal defense attorneys whose only "vice" is to go the extra yard for their clients. Further, there is no state interest whatsoever in the reversal of criminal convictions because of nonexistent ineffective assistance of counsel. The chilling effect on the criminal defense bar, coupled with the denial of due process to Partington and the absence of *any* other forum for review, calls for this Court to address these issues.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Supreme Court of Hawaii should be granted.

Respectfully submitted,

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DATED: September 30, 1992

NOS. 10041 and 11633

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CR. NO. 59285
Plaintiff-Appellee,	)	
vs.	)	
CLIFFORD M. M. CLARKE, SR.,	)	
Defendant-Appellant.	)	
	)	

ORDER

(Filed July 9, 1992)

Upon consideration of Earle A. Partington's "Motion to Vacate Judgment and Modify Memorandum Opinion of December 27, 1985 (in No. 10041), and to Vacate Judgment and Modify Memorandum Opinion of October 5, 1987 (in No. 11633), and for Writ of Prohibition Directed to Chief Disciplinary Counsel Gerald H. Kibe and Assistant Disciplinary Counsel Charlene M. Norris," the memorandum, affidavit, and exhibits in support thereof, Defendant-Appellant Clifford M.M. Clarke's joinder in motion, and the record in each of these appeals,

IT IS HEREBY ORDERED that the motion is denied.

IT IS FURTHER ORDERED that final judgments and orders having been entered in appeal Nos. 10041 and 11633 and in the RSCH 13 proceeding docketed in No.

10041, the clerks shall not accept any further filings in case Nos. 10041 and 11633.

DATED: Honolulu, Hawaii, July 9, 1992.

/s/ Ronald T.Y. Moon

/s/ Robert G. Klein

/s/ Steven H. Levinson

/s/ James S. Burns

/s/ Walter M. Heen

NO. 10041

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M.M. CLARKE, SR., Defendant-Appellant.	CRIMINAL NO. 59285 APPEAL FROM THE JUDGMENT; NOTICE OF ENTRY, FILED JULY 2, 1984 FIRST CIRCUIT COURT HONORABLE LELAND H. SPENCER Judge

MEMORANDUM OPINION

(Filed Dec. 27, 1985)

This is an appeal from a conviction for murder in violation of HRS § 707-701. The victim was the infant child of appellant's live-in girl friend.

Appellant raises numerous grounds on appeal, none of which we reach or decide because, in our view, the record is clear that the appellant did not have the effective assistance of counsel at trial and that therefore we must reverse and remand for a new trial.

The State's case against the appellant rested on circumstantial evidence. It is apparent from the record that a possible defense, contemplated by appellant and his counsel, was that the actual culprit was the mother. At oral argument, appellant's counsel suggested that another possible defense was that, while appellant might have inflicted the fatal abuse, he lacked the necessary intent to cause the child's death.

We are faced with a record in which appellant's trial counsel (1) refused to make an opening statement; (2) refused to cross-examine the mother of the victim, counsel's stated reason being that certain records with respect to the witness had not been made available to him; (3) subsequently refused to call the witness himself after the records were made available to him;[1] (4) elicited testimony from two prosecution witnesses that they believed that the appellant was guilty; and (5) refused to make a closing argument.

At oral argument, appellant's counsel asserted that each of the above decisions was justifiable as a matter of tactics. We cannot agree. In our view, on this record, none of the five alleged tactical decisions which we have enumerated above (let alone all five considered together) was within the range of competency demanded of attorneys in criminal cases. *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). The effect was to substantially impair what defenses appellant had. *Antone, supra.*

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[1] Under HRE 607, counsel could have impeached her testimony.

We remind both counsel of their obligations under HSCR 13 once a judgment on appeal has been issued by us in this case. Reversed and remanded.

DATED: Honolulu, Hawaii, December 27, 1985.

Earle A. Partington
(Schweigert & Associates
of counsel) for
appellant

/s/ Herman T.F. Lum

/s/ Edward H. Nakamuca

/s/ Frank D. Padgett

/s/ Yoshimi Hayashi

/s/ James H. Wakatsuki

Emlyn H. Higa,
Deputy Prosecuting Attorney,
for appellee

NO. 10041

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)	CR. NO. 59285
IN RE EARLE A. PARTINGTON	)	

ORDER

(Filed Sept. 24, 1990)

The report of the Special Master having been submitted, this matter comes before this court pursuant to Rule 13 of the Rules of the Supreme Court of Hawaii which provides in relevant part:

> [T]he supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth [in Rule 13 of the Rules of the Supreme Court of the State of Hawaii].

Having considered the report by the Special Master, the exceptions thereto, and the records and files in this proceeding, this court rejects the contentions that Supreme Court Rule 13 is unconstitutional on its face and that the initiation of Rule 13 proceedings in this case

violated Respondent Partington's constitutional rights *ab initio*.

However, this court finds that the Special Master exceeded the scope of his role and authority in the Rule 13 proceeding by considering and ruling *de novo* upon the issue of whether Respondent Partington rendered ineffective assistance of counsel. This issue received final adjudication by this court in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985) (mem.), and could not be relitigated under a Rule 13 proceeding. The clear language of Rule 13 limits the master to determine whether or not corrective action should be recommended against the respondent attorney.

Moreover, it was inappropriate to address allegations of ethical violations in a Rule 13 proceeding. Rule 13 is not a disciplinary proceeding but was promulgated to aid the prevention of future violations of a criminal defendant's constitutionally protected right to effective assistance of counsel by providing retraining for attorneys who have been adjudicated ineffective as counsel in criminal cases. Allegations of ethical violations should be determined according to the procedures specified in Supreme Court Rule 2.

The record reflects that such allegations have already been brought to the attention of the Disciplinary Counsel pursuant to Rule 2. This court expresses no opinion as to the merits of any such allegations.

On the record here, this court finds that Respondent Partington is not in need of corrective/remedial action pursuant to Rule 13.

IT IS HEREBY ORDERED that this proceeding is dismissed with prejudice.

DATED: Honolulu, Hawaii, September 24, 1990.

/s/ Ronald T.Y. Moon

/s/ James S. Burns

/s/ Walter M. Heen

/s/ Harry T. Tanaka

/s/ Patrick K.S.L. Yim

NO. 10041

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)	CR. NO. 59285
IN RE: EARLE A. PARTINGTON	)	

ORDER

(Filed Oct. 11, 1990)

Upon consideration of the Rule 13 Prosecutor's Motion for Reconsideration and for Clarification, this court reaffirms that the Rule 13 Special Master does not have the power to reopen the final Judicial determination that a defendant received ineffective assistance of counsel. At the same time, Rule 13 affords the respondent attorney an opportunity to put on all evidence relevant to whether or not corrective action should be recommended. Thus, the respondent attorney may present, or re-present, evidence as to the surrounding circumstances and his or her strategic reasons for the actions that resulted in the finding of ineffective assistance. The finding of ineffective assistance, although itself conclusive, does not bar the Special Master from weighing with an open mind such surrounding circumstances and strategic reasons, in conjunction with all other relevant evidence, for the limited

purpose of determining under Rule 13 whether or not corrective action should be recommended against the respondent attorney.

The motion additionally points to the provision in Rule 13 that:

> In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 or DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

Such a confidential reference by the Special Master to the Office of Disciplinary Counsel is consistent with the principle that any citizen, whether attorney, judge or member of the general public, who suspects that a disciplinary violation may have occurred should refer the matter confidentially to Disciplinary Counsel, so that Disciplinary Counsel may conduct an independent investigation pursuant to Rule 2. Rule 13 clearly contemplates that any investigation as to violations of the Disciplinary Rules shall be initiated by Disciplinary Counsel, not by the Rule 13 Prosecutor or the Special Master. There is nothing in Rule 13 to authorize the Special Master to conduct a mini-hearing as to whether a violation of the Disciplinary Rules may have occurred, or to do anything more in this area than refer confidentially to Disciplinary

Counsel the finding that a disciplinary violation may have occurred.

DATED: Honolulu, Hawaii, October 11, 1990.

/s/ Ronald T.Y. Moon

/s/ James S. Burns

/s/ Walter M. Heen

/s/ Harry T. Tanaka

/s/ Patrick K.S.L. Yim

Earle A. PARTINGTON,
Plaintiff-Appellant,

v.

Joseph M. GEDAN; Howard T. Chang,
Defendants-Appellees.

No. 87-2375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 8, 1988.

Decided March 13, 1989.

Motion to Correct Opinion Granted in
Part and Denied in Part
April 6, 1989.

As Amended April 6, 1989.

As Amended on Denial of Reconsideration
July 12, 1989.

Attorney who was made subject of disciplinary proceedings following reversal of client's conviction for ineffective assistance of counsel brought civil rights action against special master and special prosecutor. The United States District Court for the District of Hawaii, Alan Cooke Kay, J., held that abstention under *Younger* was appropriate, and attorney appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) district court properly abstained from hearing attorney's constitutional challenges to enforcement of Hawaii Supreme Court Rule against him, but (2) attorney's arguments against abstention were not so frivolous as to warrant award of costs and attorney fees under Federal Rule of Appellate Procedure.

Affirmed.

Noonan, Circuit Judge, concurred and filed opinion.

Reinhardt, Circuit Judge, concurred in part and dissented in part and filed opinion.

Earle A. Partington, Honolulu, Hawaii, for plaintiff-appellant.

Susan L. Gochros, Deputy Atty. Gen., Honolulu, Hawaii, for defendants-appellees.

Appeal from the United States District Court for the District of Hawaii.

Before WALLACE, REINHARDT and NOONAN, Circuit Judges.

WALLACE, Circuit Judge:

Attorney Partington filed suit pursuant to 42 U.S.C. § 1983 in the United States District Court, alleging that enforcement of Hawaii Supreme Court Rule 13 against him violated the first, fifth, sixth, and fourteenth amendments to the United States Constitution. He sought a declaratory judgment stating that Rule 13 violated these constitutional provisions and an injunction barring any further proceedings against him pursuant to Rule 13. The district court concluded that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (*Younger*), was appropriate because Partington could raise these constitutional challenges in the ongoing Rule 13 proceedings. We have jurisdiction and affirm.

I

The Hawaii trial court appointed Partington as trial counsel for Clarke. The State had charged Clarke with brutally murdering the three-year-old daughter of his live-in girlfriend. Partington represented Clarke at trial. Clarke was convicted of murder and sentenced to life in prison.

Partington's appointment as counsel for Clarke continued on appeal. Clarke raised numerous contentions, but did not allege ineffective assistance of trial counsel. During the pendency of the appeal, however, the state trial judge who presided at Clarke's trial complained to the Office of Disciplinary Counsel of the Hawaii Supreme Court about Partington's failure to make a closing argument at Clarke's trial. Following this complaint, Partington filed a motion with the Hawaii Supreme Court, on behalf of Clarke, requesting that the Supreme Court remand the appeal to the trial court to explore the trial judge's complaint. The motion was denied.

During oral argument before the Hawaii Supreme Court on Clarke's criminal appeal, some Justices *sua sponte* raised the issue of ineffective assistance of trial counsel. The Hawaii Supreme Court subsequently reversed Clarke's conviction. Without addressing the numerous arguments made in Clarke's brief, the court declared that Partington rendered ineffective assistance during trial. The court based this conclusion on the following: (1) Partington refused to make an opening statement; (2) he refused to cross-examine the mother of the victim ostensibly because the State did not make certain records concerning the witness available to him; (3) he

subsequently refused to call the mother after receiving the records; (4) he elicited testimony from two State witnesses that they believed Clarke was guilty; and (5) he refused to make a closing argument. The Hawaii Supreme Court's opinion concluded: "We remind both counsel of their obligations under [Hawaii Supreme Court Rule] 13 once a judgment on appeal has been issued by us in this case."

Hawaii Supreme Court Rule 13[1] outlines proceedings that are to be brought against defense counsel following

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[1] Haw.St.Ct.R. 13 provides:

PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

> Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.
>
> Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

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the adjudication of his or her ineffective assistance in criminal cases. Under Rule 13, the Hawaii Supreme Court

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Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master, he shall file with his return a motion therefore supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent himself. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the

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appoints a special master "to determine whether action against the counsel alleged to have been incompetent is

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appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with.

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 to DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

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warranted." Haw.Sup.Ct.R. 13. Within five days of this appointment, the special master notifies the defense counsel by mail. Within forty-five days of this mailing, the defense counsel must "file with the clerk of the supreme court an answer showing cause why corrective action as provided [in the Rule] should not be taken by the supreme court." *Id.* Within five days of receiving the defense attorney's answer, the special master must appoint an attorney to prosecute the proceedings. *Id.* The defense attorney and the special prosecutor then have forty-five days to conduct discovery. Within thirty days after the expiration of the discovery period, the special master holds a hearing. Within ten days after the conclusion of the hearing, the special master must render a decision and enter "an order either dismissing the proceedings or recommending corrective action against the respondent attorney." *Id.* Within twenty days of the special master's decision and proposed order, the defense attorney and the special prosecutor may file exceptions with the Hawaii Supreme Court. Within forty days of the

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Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

special master's decision and proposed order, the Supreme Court must "enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth" in the Rule. *Id.*

In accordance with Rule 13, on February 3, 1986, the Hawaii Supreme Court appointed Gedan as the special master. On February 7, 1986, Gedan notified Partington that he had forty-five days to submit an answer "showing cause why corrective action as provided for in Rule 13 should not be taken by the Supreme Court." On March 27, 1986, Partington filed an answer in accordance with the Rule. Without waiving any constitutional challenges, Partington's answer stated that he based all of his trial decisions on certain tactics, but that he could not explain his tactical choices because his client at trial, Clarke, refused to waive the attorney-client privilege.

Gedan did not appoint a special prosecutor within five days of receiving the answer as provided in Rule 13; however, on August 13, 1986, Gedan appointed Chang as the special prosecutor. Notwithstanding the time schedule set forth in Rule 13, the record does not reflect that the parties engaged in discovery during the forty-five day period as provided in the Rule or that the special master set the matter for a hearing within thirty days of the close of the discovery period.

On March 9, 1987, Partington filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of Hawaii, naming Gedan and Chang as defendants. He alleged that the conduct of Gedan and Chang pursuant to Rule 13 deprived and continue to deprive him of rights under the free speech clause of the first

amendment, the due process clause of the fifth and fourteenth amendments, the right to counsel clause of the sixth amendment, and the equal protection clause of the fourteenth amendment. The complaint sought (1) an injunction prohibiting Gedan and Chang from proceeding against Partington pursuant to Rule 13, (2) a declaratory judgment that Rule 13 as applied to Partington is unconstitutional, and (3) attorney's fees, costs, and expenses for the action. Partington also sought damages for attorney's fees and costs arising out of the Rule 13 proceeding, but later abandoned this claim. On March 30, 1987, Gedan and Chang moved to dismiss the complaint, arguing the the district court should abstain. They asserted that Partington could raise all of his constitutional claims in the Rule 13 hearing, which was scheduled to commence on April 14, 1987. The Rule 13 hearing was not held that day because Gedan stayed the hearing on Partington's request. On April 22, Partington filed a motion for summary judgment. On May 12, the Hawaii Association of Criminal Defense Lawyers (Defense Lawyers) lodged a brief in the district court on behalf of Partington as amicus curiae.

On July 1, 1987, the district court granted the Defense Lawyers' motion to file the amicus brief, granted the motion of Gedan and Chang to dismiss the complaint, and denied Partington's motion for summary judgment. The district court concluded that *Younger* abstention, as interpreted and applied in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (*Middlesex*), should be applied. After the district court entered its judgment,

Partington filed a timely notice of appeal, challenging the dismissal of the complaint.

II

Ordinarily, the dismissal of a complaint without the dismissal of the underlying action is not considered an appealable final order under 28 U.S.C. § 1291. *See Allen v. Veterans Administration*, 749 F.2d 1386, 1388 (9th Cir.1984); *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir.1984) (*Hoohuli*). Here, the district judge abstained, but maintained jurisdiction over the cause by virtue of his failure to dismiss the underlying action. This procedure, if allowed, would grant the state permission to proceed first but allow the parties to maintain a federal court presence, if needed, after the state has finalized its assessment of the issues presented. *See Crane v. Fauver*, 762 F.2d 325, 328-29 (3d Cir.1985). We have jurisdiction over this interlocutory appeal, however, because of the denial of Partington's request for an injunction preventing Gedan and Chang from proceeding against him pursuant to Rule 13. *See* 28 U.S.C. § 1292(a)(1); *Sea Ranch Association v. California Coastal Zone Conservation Commission*, 537 F.2d 1058, 1061 (9th Cir.1976).

There is another reason why we may accept jurisdiction over this appeal. We have held that where *Younger* abstention is applicable, "a district court must dismiss the action." *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir.1987) (*World Famous Drinking Emporium*), *quoting Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 (9th Cir.1986). Because the district judge was required to

dismiss the action, we may assume he intended to do so and treat the dismissal of the complaint as a dismissal of the action. *See Hoohuli*, 741 F.2d at 1171 n. 1.

That brings us to our standard of review. When the district court, pursuant to the authority of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), abstains from addressing the constitutionality of a state statute because state court proceedings interpreting the statute are still pending, we review its abstention for an abuse of discretion. *C-Y Development Co. v. Redlands*, 703 F.2d 375, 377 (9th Cir.1983). But when, as here, the district court abstains on the basis of *Younger*, which forbids federal courts from enjoining pending certain categories of state proceedings except in extraordinary circumstances, we review its abstention de novo. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 (9th Cir.1984) (*Goldie's Bookstore*). This de novo review is applied even though we are reviewing the action of the district court in granting or denying an injunction. *See id.*

III

Although abstention is the exception, not the rule, *see World Famous Drinking Emporium*, 820 F.2d at 1082, *Younger* and its companion cases generally require a federal district court to abstain from granting injunctive relief when state criminal actions or certain categories of state civil or administrative proceedings are pending against the federal plaintiff at the time he or she commences the federal action. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 1522, 95 L.Ed.2d 1 (1987) (*Pennzoil*) (injunctive relief against a prevailing civil litigant

attempting to execute a judgment in its favor pending appeal of that judgment to a state appellate court); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512 (1986) (*Dayton Schools*) (injunctive relief against administrative proceedings conducted by state civil rights commission); *Middlesex*, 457 U.S. at 428-29, 102 S.Ct. at 2519 (injunctive relief against state bar disciplinary proceedings); *Moore v. Sims*, 442 U.S. 415, 423, 433-35, 99 S.Ct. 2371, 2377, 2382-83, 60 L.Ed.2d 994 (1979) (*Moore*) (injunctive relief against state proceeding seeking to protect allegedly abused children); *Trainor v. Hernandez*, 431 U.S. 434, 435-38, 97 S.Ct. 1911, 1913-15, 52 L.Ed.2d 486 (1977) (*Trainor*) (injunctive relief against a state civil attachment/enforcement proceedings); *Juidice v. Vail*, 430 U.S. 327, 333-36, 97 S.Ct. 1211, 1216-17, 51 L.Ed.2d 376 (1977) (*Juidice*) (injunctive relief against state contempt proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-07, 95 S.Ct. 1200, 1207-09, 43 L.Ed.2d 482 (1975) (*Huffman*) (injunctive relief against state civil proceedings seeking abatement of a nuisance); *Younger*, 401 U.S. at 49-53, 91 S.Ct. at 753-755 (injunctive relief against state criminal proceedings). The *Younger* abstention doctrine is based on considerations of equity, comity, and federalism. *See, e.g., Pennzoil*, 107 S.Ct. at 1525-26; *Younger*, 401 U.S. at 43-45, 91 S.Ct. at 750-51.

A.

In applying the *Younger* doctrine, federal courts must examine (1) the nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal

relief in order to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceedings. *See Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521; *World Famous Drinking Emporium*, 820 F.2d at 1081, 1082. Courts must also examine whether the proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate." *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. But where a state tribunal has been found incompetent by reason of bias, the Supreme Court has held that there was effectively no opportunity to litigate constitutional claims. *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973) (*Gibson*); *compare Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975) (dictum agreeing that a biased state tribunal removes predicate for *Younger v. Harris* dismissal, but categorizing biased tribunal in *Gibson* as example of "extraordinary circumstance" rendering state tribunal incapable of fairly and fully adjudicating issues before it).

1.

Younger by its own terms requires federal courts to abstain from interfering in state criminal proceedings absent exceptional circumstances. *See* 401 U.S. at 53-54, 91 S.Ct. at 754-55. The Supreme Court, however, has never held that federal district courts should always abstain under *Younger* when state civil proceedings are pending. *See Moore*, 442 U.S. at 423 n. 8, 99 S.Ct. at 2377 n. 8; *Huffman*, 420 U.S. at 607, 95 S.Ct. at 1209. Nonetheless, the Court has held that, under *Younger*, federal courts should

abstain from interfering with state disciplinary proceedings analogous to the Rule 13 proceeding currently pending against Partington. *See Middlesex*, 457 U.S. 423, 102 S.Ct. 2515. In *Middlesex*, the Middlesex County Ethics Committee, a tribunal under the jurisdiction of the New Jersey Supreme Court, charged Hinds, a member of the New Jersey Bar, with violating two New Jersey disciplinary rules. *Id.* at 425-28, 102 S.Ct. at 2518-19. Rather than filing an answer to the charges as provided in the New Jersey Bar disciplinary procedures, Hinds filed suit in federal district court, alleging that the disciplinary rules violated his first amendment rights and were facially vague and overbroad. *Id.* at 429, 102 S.Ct. at 2519. The district court abstained under *Younger*, but was reversed by the Third Circuit. *Id.* at 429, 102 S.Ct. at 2519.

Recognizing that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved," the Supreme Court proceeded to review the New Jersey State Bar disciplinary proceedings in light of the three requirements for abstention under *Younger*. *Id.* at 432, 102 S.Ct. at 2521. First, observing that the local Ethics Committees acted as an arm of the New Jersey Supreme Court, the Court determined that "[f]rom the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee." *Id.* at 433-34, 102 S.Ct. at 2522. Significant to the Court's determination that the state disciplinary proceedings were "judicial" in nature was its analogizing of the role local ethics or bar associations to that of a special master. *Id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13. Next, the Court acknowledged that the state "has an *extremely important*

interest in maintaining and assuring the professional conduct of the attorneys it licenses," especially "the professional conduct of attorneys involved in the administration of *criminal* justice." *Id.* at 434, 102 S.Ct. at 2522 (emphasis added). Last, the Court opined that because Hinds "failed even to *attempt* to raise any federal constitutional challenge in the state proceedings," he had not shown that "the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees." *Id.* at 435, 102 S.Ct. at 2522 (emphasis in original). Having concluded that the three prerequisites for *Younger* abstention were satisfied, the Court reversed the Third Circuit, holding that it was proper for the district court to have stayed its hand in this case. *See id.* at 437, 102 S.Ct. at 2524.

The Rule 13 disciplinary proceeding initiated against Partington in Hawaii is strikingly similar to the New Jersey disciplinary proceedings at issue in *Middlesex*. Both proceedings are conducted by an ethics committee or its analogue, a special master, *id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13, under the auspices of the state supreme court. *Compare* 457 U.S. at 425-27, 433, 102 S.Ct. at 2518-19, 2522 *with* Haw.S.Ct.R. 13. Just as the Court in *Middlesex* concluded that the State of New Jersey had a "special" interest "in the professional conduct of attorneys involved in the administration of criminal justice," 457 U.S. at 434, 102 S.Ct. at 2522, we conclude that Hawaii has a vital interest in ensuring that defense counsel in criminal cases perform within the standards of reasonable professional competence. Partington concedes, as he must, that the State of Hawaii has a very important interest

in its Rule 13 proceedings. Thus, the first requirement for *Younger* abstention has been met. In addition, there is no question that the Rule 13 proceedings had begun and were still pending at the time Partington filed suit in the district court. Partington concedes this point as well. Thus, the second requirement for *Younger* abstention has been met. Unless Partington can show that, unlike the New Jersey state disciplinary proceedings discussed in *Middlesex*, the Rule 13 proceedings against him do not offer him an opportunity to raise his constitutional claims and have them timely decided by a competent state tribunal, *see Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524; *Gibson*, 411 U.S. at 573-74, 93 S.Ct. at 1695, or that this proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate," *Middlesex*, 457 U.S. at 435, 437, 102 S.Ct. at 2522, 2524, *Middlesex* governs and we must, accordingly, affirm the dismissal of this action under *Younger*.

2.

Under the third prong of the test for *Younger* abstention, federal abstention is inappropriate unless the plaintiff is afforded the opportunity in the ongoing state proceedings to raise his constitutional claims "and have [those claims] timely decided by a competent state tribunal." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697; *accord Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Partington strenuously advances two grounds why the Rule 13 proceedings against him fail to meet this third required predicate for *Younger* abstention.

First, he maintains that the attorney-client privilege procedurally bars him from disputing the Hawaii Supreme Court's finding of ineffectiveness of counsel, thereby depriving him of an opportunity to raise his federal constitutional claims during his Rule 13 proceedings. If a federal plaintiff cannot raise his federal claim in the state proceedings because state procedures do not afford him the opportunity to do so, then abstention is not appropriate. *See, e.g., Gerstein v. Pugh,* 420 U.S. 103, 108 n. 9, 95 S.Ct. 854, 860 n. 9, 43 L.Ed.2d 54 (1975). Partington argues that abstention is inappropriate here because Clarke's refusal to waive the attorney-client privilege disables him from contesting the ineffectiveness of counsel issue in either the Rule 13 proceedings or in the Hawaii Supreme Court. Partington believes that the "self-defense" exception to the attorney-client privilege, *see* Disciplinary Rule 4-101(c)(4),[2] only applies when the

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[2] Disciplinary Rules, DR 4-101, *Preservation of Confidences and Secrets of a Client,* provides:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.

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client questions the attorney's conduct. Clarke has not done so. We interpret this argument to mean that Partington believes Hawaii's interpretation of the attorney-client privilege imposes a procedural bar that effectively prevents him from testifying on the issue of ineffectiveness because he cannot fully present his trial strategy defense.

Partington bears the burden of showing " 'that state procedural law bar[s] presentation of [his] claims.' "

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(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Pennzoil, 107 S.Ct. at 1528, *quoting Moore*, 442 U.S. at 432, 99 S.Ct. at 2381. Asserted ambiguities in Hawaii's rule regarding the attorney-client privilege or on the procedures available in Rule 13 proceedings for the presentation of his federal claims do not relieve him of this burden. Federal courts "cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Pennzoil*, 107 S.Ct. at 1528. Moreover, given that Partington "has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.; see also Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. In addition, even if a federal plaintiff cannot raise his constitutional claims in state administrative proceedings that implicate important state interests, his ability to raise the claims via state judicial review of the administrative proceedings suffices. *Dayton Schools*, 477 U.S. at 629, 106 S.Ct. at 2724. Requiring a federal plaintiff to present his constitutional challenges in the state proceedings recognizes that state courts can and will perform their responsibility to safeguard federal constitutional rights. *See, e.g., Pennzoil* 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2520; *Trainor*, 431 U.S. at 443, 97 S.Ct. at 1917.

Partington has not met his burden. He does not explain how this alleged procedural bar prevents him from presenting his first, fifth, sixth, and fourteenth amendment claims in the Rule 13 proceedings. Nor has Partington unambiguously shown that Hawaii's "self-defense exception" to the attorney-client privilege, *see* DR

4-101(C)(4), *only* applies when a client attacks his attorney's conduct. *Cf.* ABA/BNA Lawyer's Manual on Professional Conduct, *Disclosure: Attorney's Benefit*, at 55:701, 703, 706-08(BNA)(Nov. 11, 1987) (discussing cases where the privilege does not apply even though the client is not attacking the attorney's conduct.) In any event, Partington "should first set up and rely upon [this procedural] defense in the [Hawaii] state courts." *Younger*, 401 U.S. at 45, 91 S.Ct. at 751, *quoting Fenner v. Boykin*, 271 U.S. 240, 244, 46 S.Ct. 492, 493, 70 L.Ed. 927 (1926). We cannot assume that Hawaii will interpret its attorney-client privilege to bar Partington from speaking in his own defense. *Pennzoil*, 107 S.Ct. at 1528.

Second, Partington argues that the third prong for abstention is not met in this case because both the special master and the Hawaii Supreme Court are biased against him. In *Gibson*, the Supreme Court recognized that if the federal plaintiff can establish that either the state administrative tribunal or the state court is not "competent" because of bias, then abstention is not appropriate. *See* 411 U.S. at 577, 93 S.Ct. at 1697. In addition, it recognized that de novo judicial review on the decision of a "biased" administrative board does not satisfy the competent tribunal requirement of the third predicate for *Younger* abstention. *See id.* & n.16. Here, Partington contends that a finding in the Rule 13 proceeding before the special master or the Hawaii Supreme Court that he rendered effective assistance of counsel would be totally incompatible with the Hawaii Supreme Court's decision in *State v. Clarke*. From this, he concludes that the issue of ineffectiveness has been prejudged against him. Partington further assails the impartiality of the Hawaii Supreme Court

by asserting that the large amount of publicity that *State v. Clarke* generated has biased the Hawaii Supreme Court against his case.

In claiming bias, Partington must overcome the presumption that the special master and the Hawaii Supreme Court are unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982). He can rebut this presumption "by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

In support of his claim of judicial bias, Partington relies on *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (*Withrow*). The Court there examined a Wisconsin statute that allowed a state medical examining board to warn and reprimand a physician, to suspend a physician's license temporarily, or to institute a criminal action or an action to revoke a license when it found probable cause under governing criminal or revocation statutes. *Id.* at 37, 95 S.Ct. at 1459. When the medical examining board commenced investigative proceedings against Larkin, Larkin filed suit in federal court under 42 U.S.C. § 1983 seeking an injunction against the investigation, which was initially denied by the federal district court. *Id.* at 39, 95 S.Ct. at 1460. The board subsequently notified Larkin that it would hold a "contested hearing" in order to determine whether to suspend his license temporarily. *Id.* at 40-41, 95 S.Ct. at 1461. The federal district court then enjoined the board because it concluded that by authorizing the board to perform a dual investigatory and adjudicative function, the Wisconsin statute raised serious procedural due process concerns by permitting a physician to lose his liberty or property at

the hands of a biased decisionmaker. *Id.* at 41-42, 95 S.Ct. at 1462.

The Supreme Court reversed the preliminary injunction, concluding that it was "quite unlikely" that the physician would ultimately prevail on his procedural due process challenge. *Id.* at 46, 95 S.Ct. at 1464. Recognizing that biased decisionmakers do not satisfy procedural due process, *id.*, at 46-47, 95 S.Ct. 1464, the Court nonetheless rejected the contention "that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication." *Id.* at 47, 95 S.Ct. at 1464. Instead, the Court emphasized that one who advances such an argument

> must overcome a presumption of honesty and integrity in those serving as adjudicators; and [he] must convince [the court] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. In repudiating the appellant's claim of presumptive bias, the Court observed that when an appellate court reverses an administrative law judge or a lower court judge, procedural due process does not mandate that a new judge retry the case. *Id.* at 48-49, 95 S.Ct. at 1465. Similarly, the Court rejected the proposition that simply because the board issued written findings of fact and conclusions of law in support of its probable cause determination, the board had prejudged the case. *Id.* 56-57, 95 S.Ct. at 1469. The Court pointed out that an initial finding

of probable cause to believe a physician had violated a statute was not logically inconsistent with a subsequent decision, based on complete evidence brought out at an adversarial hearing, that the physician did not violate the statute. *Id.* at 57-58, 95 S.Ct. at 1469-70.

Partington argues that *Withrow* stands for the proposition that bias is established where the accusatory finding is incompatible with any adjudicative finding. He relies on the statement from *Withrow* that "if the initial view of the facts based on the evidence derived from nonadversarial processes as a *practical* or *legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Id.* at 58, 95 S.Ct. at 1470 (emphasis added). From this interpretation of *Withrow,* Partington then argues that the following three factors all indicate that he is legally foreclosed from contesting the Hawaii Supreme Court's finding of ineffectiveness of counsel in *State v. Clarke*: (1) the title of Rule 13, "Proceedings Following Final Adjudication Of Ineffective Assistance Of Counsel In Criminal Cases," indicates that the decision is final; (2) the text of Rule 13, in part, speaks only of the special master determining whether "corrective action" should be taken; and (3) the Hawaii Supreme Court's order appointing the special master states that there was "a finding of ineffective assistance of trial counsel."

Under the third prong of *Younger,* Partington must demonstrate that he would not have an adequate opportunity to litigate his federal constitutional claims – in this case, as he argues, before a competent and unbiased state adjudicator. *Middlesex,* 457 U.S. at 432, 102 S.Ct. at 2521;

Gibson, 411 U.S. at 577, 93 S.Ct. at 1697.[3] He has not done so. The Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the criminal case. There is neither legal nor practical reason to believe that the Hawaii Supreme Court will be biased on this issue which it has never addressed. We cannot and should not guess how the court will respond. *Withrow* is irrelevant to Partington's unaddressed due process claims.

Moreover, we conclude that Partington has not demonstrated under *Withrow* that, as a practical or legal matter, the special master or the Hawaii Supreme Court is

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[3] The dissent suggests that we have misunderstood the third prong of the *Middlesex* test, the prong requiring that federal claimants have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. It is true that in neither *Middlesex* nor *Younger* is a biased tribunal mentioned under this third prong. The majority and the dissent agree that *Younger* abstention is inappropriate when bias renders a state tribunal incompetent; we disagree over how to categorize the Supreme Court's decision in *Gibson*. *Gibson* analyzed incompetency caused by bias in connection with the plaintiff's opportunity to litigate federal constitutional claims before a competent state tribunal. 411 U.S. at 577, 93 S.Ct. at 1697. The dissent, however, focuses on dictum in *Kugler v. Helfant* categorizing the biased tribunal finding in *Gibson* as an "extraordinary circumstance." 421 U.S. at 124-25 & n. 4, 95 S.Ct. at 1530-31 & n. 4. Despite this dictum, we believe it better to follow *Gibson's* approach of analyzing bias in connection with whether there is an opportunity to litigate the federal constitutional claims, which became the third *Middlesex* prong.

bound by *State v. Clarke* or has prejudged the ineffectiveness issue. *Cf. Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 779 & n. 10 (9th Cir.1982) (rejecting claim that a school board could not, consistent with due process, conduct an impartial hearing to review its prior decision to terminate a teacher's employment). As for the legal issue, the title of Rule 13 is somewhat troubling in that it may indicate that the finding of ineffectiveness is conclusive. Furthermore, the Rule itself is not clear on the issue of whether defense counsel can contest the issue of ineffectiveness anew before the special master and the Hawaii Supreme Court, and the Chief Justice's order appointing Gedan can be read as indicating that the Supreme Court has already decided the ineffectiveness issue. But, as we have already observed, Partington bears the burden of demonstrating, through "unambiguous authority", that both the special master and the Hawaii Supreme Court are precluded from considering the ineffectiveness issue de novo. *See Pennzoil*, 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. We do not believe that Partington has carried this burden by reciting the foregoing factors. Rule 13 states in its second paragraph that defense counsel is only "*alleged* to have been incompetent." (Emphasis added.) The special master, moreover, has the power to dismiss the proceedings. This power presumably includes the power to conclude that the criminal defense attorney did not in fact render ineffective assistance.

The Hawaii Supreme Court's initial determination of ineffectiveness will apparently not have collateral estoppel effect in the Rule 13 proceedings. *See Santos v. State Department of Transportation*, 64 Haw. 648, 652, 646 P.2d

962, 965-66 (1982) (per curiam) (discussing issue preclusion under Hawaii law). This conclusion is consistent with a letter written by the Chief Justice to Partington and others stating that Rule 13 provides "a procedure where the attorney in question ha[s] an opportunity to contest, on his own behalf, the charge of ineffective assistance of counsel, before an impartial master, who is in no way bound by the previous determination in the criminal case. . . . " If the attorney disagrees, the Rule "provides for the master's determination to be reviewed by the Supreme Court. . . . " In *Middlesex*, the Court considered the actions of the New Jersey Supreme Court clarifying Hinds's ability to raise his constitutional challenges. 457 U.S. at 436, 102 S.Ct. at 2523. Although the Hawaii Supreme Court has not formally spoken on this issue, we believe that, in the absence of clear authority to the contrary, the letter of the Chief Justice can be considered as an interpretive gloss for purposes of abstention clarifying that, as a legal matter, Partington will be able to contest the finding of ineffectiveness during his Rule 13 proceedings. In addition, the primary issue before the special master and, perhaps ultimately, the Hawaii Supreme Court, is whether corrective action is warranted under Rule 13. Partington does not contend that the court has prejudged this issue.[4]

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[4] Relying on *Gibson*, the dissent suggests that the majority has misconceived "the basic rule governing abstention and biased state tribunals" (dissent at p. 137) because we require inquiry of a biased state tribunal whether it is biased. Dissent at pp. 137-138. While we do not disagree with the legal premise, the dissent overlooks that there has been no finding that

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We also find no practical limitation on Partington's ability to address any of his arguments to an impartial tribunal. To the extent that Partington believes that certain members of the Supreme Court may be personally biased against him, either by virtue of their finding of ineffectiveness of counsel in *State v. Clarke* or as a result of the high profile nature of the publicity in that case, he may be able to file an affidavit seeking recusal under Haw.Rev.Stat. § 601-7(b) (1985).[5] *Cf. Flangas v. State Bar of*

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the Supreme Court of Hawaii is biased on the constitutional issues.

But more important, *Gibson* is distinguishable from the instant case. The state tribunal in *Gibson* was the Alabama Board of Optometry, "the statutory body with authority to issue, suspend, and revoke licenses for the practice of optometry." 411 U.S at 567, 93 S.Ct. at 1692. This Board was comprised solely of practicing optometrists. *Id.* at 571, 93 S.Ct. at 1694. Of course, a tribunal comprised of optometrists does not have the ability to entertain constitutional claims. Optometrists are incompetent in this area; their domain is the visual process, not due process. By contrast, the state tribunal in *Partington* is a court, indeed, the Hawaii Supreme Court. It is comprised of experienced jurists. That this court has the ability to entertain and resolve constitutional claims is incontrovertible. There is simply no comparison between State Supreme Court justices and a group of optometrists in their competency to face constitutional issues: Justices are competent, optometrists are not. Partington has failed to demonstrate that he will not be afforded the opportunity to litigate his constitutional claims before a competent state tribunal. The third prong of *Middlesex* requires us to abstain. Contrary to the dissent's assertion, *Gibson* does not dictate a different result.

[5] Haw.Rev.Stat. § 601-7 provides:

> (a) No person shall sit as a judge in any case in which the judge's relative by affinity or consanguinity

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Nevada, 655 F.2d 946, 950 (9th Cir.1981) (holding that this court cannot ascertain the availability of the biased adjudicator exception to *Younger* abstention until appellant attempts to avail himself of state statutory procedures to disqualify allegedly biased supreme court justices). Hawaii provides that Hawaii circuit judges and retired Supreme Court Justices may sit on the Hawaii Supreme Court when one of the Justices recuses himself. *See*

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within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been of counsel or on an appeal from any decision or judgment rendered by the judge.

(b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

Haw.Rev.Stat. § 602-10 (1985).[6] The statute even contemplates that some cases may arise in which all five Supreme Court Justices would recuse themselves, *id.* Moreover, we must presume that each Hawaii Supreme Court Justice will follow his duty under Haw.S.Ct.R. 5 to "be unswayed by partisan interests, public clamor, or fear of criticism," Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct, Canon 3(A)(1), and to recuse himself if "he has a personal bias or prejudice concerning a party. . . . " Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct,

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[6] Haw.Rev.Stat. § 602-10 provides:

> Parties shall be entitled to bring an appeal before a full court. Oral argument shall be before a full court; provided that in an appropriate case the court in its discretion may dispense with oral argument. In case of a vacancy, or if a justice of the supreme court is disqualified from sitting in any case pending before this supreme court, or is unable to attend, or is absent, or is recused or has been excused, the vacancy or the place of such justice may be temporarily filled by a circuit judge designated by the chief justice or by the appointment of a justice who has retired from the supreme court. Such retired justice chosen to serve as substitute justice shall not be actively engaged in the practice of law. A retired justice, when sitting as substitute justice, shall be compensated at a rate of pay of associate justices of the supreme court. When necessary, the court may consist of five circuit judges, so designated or five retired justices so appointed or any combination of circuit judges and retired justices. After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice.

Canon 3(C)(1)(a). Partington has provided no reason to strip these individuals of the "presumption of honesty and integrity." *See Withrow,* 421 U.S. at 47, 95 S.Ct. at 1464.[7]

B.

Even if the necessary three predicates exist, however, *Younger* abstention will not be appropriate if the federal plaintiff can establish (1) that the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) that some other "extraordinary circumstances" exist, such as proceedings pursuant to a "flagrantly" unconstitutional statute. *See, e.g., Younger,* 401 U.S. at 49-50, 53-54, 91 S.Ct. at 753, 754-55.

1.

The scope of *Younger*'s bad faith exception is not clear. Although the Court in *Younger* and its progeny has continuously recognized that abstention would not be required if a federal plaintiff could establish that the state court proceedings were instituted in bad faith, the Court has never actually applied the exception. Federal circuit courts, however, have occasionally found that "bad faith" exception applicable. *See, e.g., Rowe v. Griffin,* 676 F.2d

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[7] The dissent draws attention to language in the Chief Justice's April 27, 1987, letter to Partington which, the dissent suggests, indicates that the Chief Justice has prejudged Partington's due process and equal protection claims. Dissent at p. 138 n. 8 & p. 144 n. 24. The Chief Justice is at liberty to recuse himself if his impartiality or the appearance of judicial objectivity is drawn into question.

524, 525-26 (11th Cir.1982); *Heimback v. Lyons*, 597 F.2d 344, 346-47 (2d Cir.1979) (per curiam); *Wilson v. Thompson*, 593 F.2d 1375, 1381-83 (5th Cir.1979). No bad faith has been demonstrated in this case.

2.

Because "[t]he very nature of 'extraordinary circumstances' . . . makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings," *see Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530, 44 L.Ed.2d 15 (1975), the scope of *Younger's* "exceptional circumstances" exception is also unclear. As with the bad faith exception, the Supreme Court has consistently recognized the exception, but has never held that the exception applied.

The exception clearly recognizes, however, that a federal court need not abstain when faced with a flagrantly unconstitutional statute. *See Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55. This aspect of the exception applies only when a statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Id., quoting Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941) (*Watson); accord Trainor*, 431 U.S. at 446-47, 97 S.Ct. at 1919.

Partington argues that Rule 13 flagrantly violates the first amendment, procedural due process, and the equal protection clause of the fourteenth amendment on its face

and as applied. We have examined the arguments that Partington makes in challenging Rule 13. He has certainly raised some colorable constitutional arguments. Nonetheless, he has failed to demonstrate that Rule 13 is " 'patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55, *quoting Watson*, 313 U.S. at 402, 61 S.Ct. at 967. Therefore, we reject Partington's argument that this exception prevented the district court from abstaining.

IV

Partington also contends that the Hawaii Supreme Court's decision in *State v. Clarke* (1) violated the first amendment because the decision had a chilling effect on his ability to hold himself out as a competent counsel, (2) violated the fifth and fourteenth amendment because the decision deprived him of a liberty and property interest in his reputation without due process of law, and (3) violated the sixth amendment which he argues "necessarily includes a corresponding right of a criminal defense attorney to practice his profession without unreasonable hindrances." Partington believes that both the fifth amendment and the sixth amendment require courts to grant a "pre-deprivation" hearing to all defense counsel alleged to have rendered ineffective assistance and that the Hawaii Supreme Court, in deciding *State v. Clarke* did not comply with these constitutional requirements. Partington argues that the special master lacks the power to analyze these issues or to undo these constitutional harms and that it is unreasonable to believe that the

Hawaii Supreme Court will analyze these issues or undo these harms; therefore, abstention is not appropriate. Accordingly, Partington requests a declaratory judgment stating that in rendering its decision in *State v. Clarke* and concluding that Partington rendered ineffective assistance of counsel, the Hawaii Supreme Court violated the first, fifth, and sixth amendments.

The district court did not expressly address any of these arguments or the requested declaratory relief regarding the Hawaii Supreme Court's decision in *State v. Clarke*. At oral argument, we expressed doubt whether Partington presented these constitutional challenges in the district court concerning the manner and the effect of the Hawaii Supreme Court's decision in *State v. Clarke*. We pointed out that the prayer for relief in Partington's complaint did not request a declaratory judgment that in rendering its decision in *State v. Clarke* the Hawaii Supreme Court violated the first, fifth, and sixth amendments. Rather, the complaint states that because of the defendants' action he "is entitled to . . . [a] declaratory judgment that HSCR 13 as applied to Plaintiff is unconstitutional." At oral argument, Partington contended that his request for declaratory relief in the context of Rule 13 included the first, fifth, and sixth amendment challenges to the Hawaii Supreme Court's decision in *State v. Clarke*. He claims that he couched his request for relief in terms of Rule 13 because the Hawaii Supreme Court's decision in *State v. Clarke* was the "first step" under Rule 13. He argued that even if his complaint was not totally clear on the requested relief, his brief in the district court made his argument concerning the Hawaii Supreme Court's decision in *State v. Clarke* clear.

Gedan and Chang denied that Partington had presented this challenge in the district court. They contend not only that it would be inappropriate to allow Partington to bypass the district court, but also that such an attack on *State v. Clarke* implicates the *Rooker-Feldman* doctrine forbidding lower federal courts to sit in direct review of state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 1314-16, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed 362 (1923); *see also Mackay v. Pfeil*, 827 F.2d 540, 543-45 (9th Cir.1987) (per curiam); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-93 (9th Cir.1986) (*Worldwide Church of God*).

We have reviewed Partington's complaint and the brief he submitted to the district court. Although we might be able to read Partington's rather unclear brief as contesting the constitutionality of the Hawaii Supreme Court's decisionmaking process in *State v. Clarke*, his complaint merely sought declaratory and injunctive relief against the defendants – Gedan and Chang – involved in the Rule 13 proceedings. Thus, the lack of clarity in his brief and the wording of his complaint lead us to conclude that he did not clearly raise the issue in the district court.

Ordinarily, we will decline to review an issue not clearly raised in the district court unless necessary to prevent manifest injustice, unless a new issue arises while the appeal is pending because of a change in the law, or unless the issue is purely one of law that is both central to the case and important to the public and the necessary facts are fully developed. *See Romain v. Shear*, 799 F.2d

1416, 1419 (9th Cir.1986) (per curiam), *cert. denied*, 481 U.S. 1050, 107 S.Ct. 2183, 95 L.Ed.2d 840 (1987); *Yuchert v. Heckler*, 774 F.2d 1365, 1367 (9th Cir.1985), *rev'd on other grounds*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). Even if one of these exceptions apply, we retain discretion to decline to address the issue.

We decline to review on this appeal Partington's attack on the Hawaii Supreme Court's decisionmaking process and judgment in *State v. Clarke*. The arguments implicate the *Rooker-Feldman* doctrine and neither party has briefed this significant issue. *Cf. Worldwide Church of God*, 805 F.2d at 893 n. 4 (noting that the *Rooker-Feldman* doctrine applies to section 1983 actions).

V

Gedan and Chang requested costs and attorney fees pursuant to Fed.R.App.P. 38. Under Rule 38, we may award fees and single or double costs "when the result is obvious and the arguments on appeal wholly lack merit." *McCarthy v. Mayo*, 827 F.2d 1310, 1318 (9th Cir.1987) (citation omitted). Gedan and Chang contend that Partington's attempts to distinguish *Middlesex* were frivolous.

In response to this request for costs and attorney fees, Partington requested sanctions pursuant to Fed.R.Civ.P. 11 against Gedan and Chang for their request for costs and attorney fees. The Defense Lawyers joined Partington's request for sanctions.

We have power to sanction Gedan and Chang pursuant to Rule 11. *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United*

States Aircraft Insurance Group, 823 F.2d 302, 304-05 (9th Cir.1987); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986).[8] Though Gedan and Chang's request for Rule 38 sanctions appears in their opening brief, we consider their request as a separate motion to this court, severable from the balance of the brief.

The Seventh Circuit's discussion of a request for sanctions under Fed.R.App.P. 38 is particularly appropriate. The court limited its opinion to the defendant's request for attorney's fees under Rule 38. The court stated:

> The plaintiff's appeal, although not meritorious, is plainly not frivolous; it is the defendant's request for Rule 38 sanctions that is

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[8] The dissent suggests that Rule 11 is not a proper basis for imposing sanctions against Chang and Gedan. Conceding that this court has sanctioned attorneys pursuant to Rule 11, the dissent maintains that in each case the sanctionable conduct occurred in the district court. Dissent at 35 & n. 34. The dissent is mistaken. *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), held that:

> Curl's excuses do not relieve him of responsibility for having *brought an appeal* that should not have been brought, for subjecting Harvester to the burden of appellate litigation, and for having put this court to the task of *reading, analyzing, and judging his baseless arguments*. . . . The *brief* filed by Curl was not well-grounded in fact and he had not made reasonable inquiry.

Id. (emphasis added). Contrary to the dissent's assertion, dissent at 35 n. 34, *In re Curl* is not ambiguous. This court sanctioned Curl for much more than filing a frivolous notice of appeal in district court; we sanctioned him for conduct occurring in the appellate court.

> frivolous. We are troubled by the frequency with which lawyers in this court, whether representing appellants or appellees, are including in their briefs groundless requests for Rule 38 sanctions. The attitude seems to be, it can't hurt to ask. It can. Any frivolous motion, pleading, or request is subject to sanctions, including a motion or request for sanctions. *In re Central Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir.1987). We remind the bar that sanctions will be forthcoming if counsel routinely request Rule 38 sanctions without careful investigation to determine that the appeal or defense sought to be sanctioned is indeed frivolous. *See also Aircraft Trading & Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1236 (2d Cir.1987).

Meeks v. Jewel Co., 845 F.2d 1421, 1422 (7th Cir.1988) (per curiam) (*Meeks*). We believe that *Meeks* fully applies to the request for attorneys' fees and costs by Gedan and Chang.

Far from being frivolous, Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent, although not ultimately meritorious. The arguments required us to examine closely the Rule 13 proceedings and interpret whether Partington would be able to raise his serious constitutional challenges to Rule 13 in the Rule 13 proceedings before the special master and, if necessary, on appeal to the Hawaii Supreme Court. Moreover, we fully expect that the special master and the Hawaii Supreme Court will examine carefully and seriously Partington's allegations that Rule 13 violates the first amendment free speech clause as incorporated by the fourteenth amendment, the fifth amendment guarantee of procedural due process as incorporated by the fourteenth amendment,

and the fourteenth amendment equal protection clause, both on its face and as applied. All of these issues are important and will require careful and detailed examination. To charge that these issues are frivolous is surprising – to claim Rule 38 sanctions for Partington's bringing them to our attention is the vice described by the Seventh Circuit in *Meeks*.

We deny the request by Gedan and Chang for Rule 38 sanctions and grant the Rule 11 request by Partington and the Defense Lawyers. We order Gedan and Chang to pay Partington's and the Defense Lawyers' costs and attorneys' fees incurred in responding to the motion for Rule 38 sanctions. The district court is instructed to determine the amount of the sanction.

AFFIRMED.

NOONAN, Circuit Judge, concurring:

I concur in the opinion of the court and note that the foundation of the dissent is that the Hawaii Supreme Court "is, as a matter of law, biased against Partington." I do not find it so easy to reach the dissent's conclusion in the light of what, in terms of current law and history, has constituted a biased tribunal. The ideal has always been an absolutely impartial judge. In practice, the ideal has been tempered by the qualification put by the old Constitution of Massachusetts which guaranteed a judge "as impartial as the common lot of humanity will admit." Constitution of Massachusetts, Part 1, Declaration of the Rights of the Inhabitants (1780). What the common lot of humanity will admit has varied.

A leading recent case from this circuit is *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Here a panel consisting of Circuit Judges Kennedy and Tang and District Judge Palmieri considered a criminal appeal by Joseph Conforte, the operator of a legalized house of prostitution in Nevada. The district judge who had presided at his trial had, as president of the Reno Unit of the American Contract Bridge League, participated in the decision to reject Conforte's application to join the League because of his prior convictions and proprietorship of the house of prostitution. At a cocktail party in 1973 the judge had also advised against accepting a contribution from Conforte for the University of Nevada football team. The judge had remarked the Conforte ran a house of prostitution and "was not good for Reno." *Id.* at 879.

District Judge Warren J. Ferguson heard Conforte's motion for a new trial on the grounds of the district judge's bias and found that the district judge had not been disqualified. *United States v. Conforte*, 457 F.Supp. 641 (D.Nev.1978). Upholding this ruling, Judge Kennedy for the panel stated: "We find no reasonable grounds for questioning the judge's impartiality because of bias or prejudice. . . . [T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind – [that evinces] an aversion or hostility of a kind or degree that a fair minded person could not entirely set aside when judging certain persons or causes." *Conforte*, 624 F.2d at 881.

This standard, it is apparent, is such that a previous legal ruling would not constitute disqualifying bias because it is not the kind of aversion or hostility that a

fair-minded person would be unable to set aside. Specifically, at a later point in the opinion, the panel held: "A judge's view on legal issues may not serve as the basis for motions to disqualify." *Id.* at 882 (citations omitted).

The history that lies behind this treatment of disqualifying prejudice as a term of art is worth reviewing. The Judiciary Act of 1789 provided that district judges should not review their own decisions on appeal to the circuit courts, but at the same time provided that Supreme Court Justices should regularly act as circuit judges and made no provision for disqualifying them from reviewing their own decisions. In 1790 Chief Justice John Jay composed a letter to be sent by the entire Supreme Court to President Washington on this problem. Jay pointed out that having once decided an issue, a justice would not be

> secured against the influence of those predilections for individual opinions, and of those reluctances to relinquish sentiments publicly, though, perhaps, too hastily given, which insensibly and not unfrequently infuse into the minds of the most upright men some degree of partiality for their official and public acts.

Letter from John Jay to James Iredell (Sept. 15, 1790) (enclosing draft), *reprinted in* 2 G. McRee, *Life and Correspondence of James Iredell* (1857). Jay also alluded to the case where a justice might disqualify himself from sitting on his own decision but the public would still believe that in the decision of the Supreme Court reviewing his decision, "mutal interest had generated mutual civilities and tendernesses injurious to right." *Id.* Chief Judge [sic] Jay observed that appellate cases were usually doubtful with "much appearance of reason on both sides"; it would shake the confidence of the losing litigant and the public

if the court in reaching such difficult questions appeared to be biased by the pre-judgment made by one or more of it members.

It is unclear whether any other justice signed Chief Justice Jay's letter. It was never sent. 1 J. Goebel, Jr., *History of the Supreme Court of the United States*, 556 (1971). The Supreme Court did not hesitate to act as a court of appeals from decisions of circuit courts made by the Justices as circuit judges. When in 1803 the practice was finally challenged by a litigant, the Court held that acquiescence in the practice prevented change. *Stuart v. Laird*, 1 Cranch 299, 309 (1803). The practice of judging appeals from one's own decisions continued in the Marshall court. *E.g.*, *The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825).

It could not be much clearer that the Founders and the early Supreme Court did not believe that a judge was biased as a matter of law because he had previously ruled on the question being presented to him. Eventually by statute the practice ceased in 1891. Judiciary Act of March 3, 1891, ch. 517, 26 Stat. 826, § 3. But the problem has scarcely disappeared. It is the regular practice of the circuit courts of appeal to schedule sessions en banc in which panel members, who have previously heard the case, sit as members. The session is called a "rehearing" but the reality is that the reargument before the en banc court is a fresh hearing. Often there is new briefing and always there is new oral argument. There are always judges sitting who have never heard the case before. At the same time the judges on the en banc panel who have heard the case the first time and decided it are not

regarded as biased as a matter of law in sitting to judge this fresh appeal.

One difference exists between these practices and the case Partington presents. At least in the practices mentioned a party has had an opportunity to defend himself before the judge who ruled against him the first time, whereas Partington suffered an adverse ruling in a case where he had no possibility of defending himself. This distinction, however, is not material if the question is one of prejudice on the part of the judge. In the federal practices mentioned and in the Hawaii case the judges at one point have made up their minds. In the most literal sense they are prejudiced judges: they have prejudged the case now before them. In the federal practices it was and is assumed that they can unmake their minds and consider the case afresh. Why should this assumption not be the case in Hawaii?

When a litigant was, for the first time, permitted to challenge a federal judge on the grounds of bias, it was on the basis of a statute enacted in 1911. The challenge could only be for "personal bias or prejudice." Act of March 3, 1911, ch. 231, 36 Stat. 1090, § 21. Interpreting this statute, the Supreme Court said that the party seeking to disqualify the judge must "state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice." *Ex Parte American Steel Barrel, Co. and Seaman*, 230 U.S. 35, 43-44, 33 S.Ct. 1007, 1009-10, 57 L.Ed. 1379 (1913). Applying the statute to disqualify District Judge Keneshaw Mountain Landis in 1921, the Court observed that the bias "must be based upon something other than rulings in the case." *Berger v.*

United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921). In *Denis v. Perfect Parts,* 142 F.Supp. 263 (D.Mass.1956), Judge Bailey Aldrich had ruled in a previous case that the patent in question was valid. When the same patentee brought a case against a different defendant, the defendant objected that Judge Aldrich was prejudice because he had already ruled on the validity of the patent. Judge Aldrich refused to disqualify himself, ruling, "The statute is directed to personal bias, not to previous judical exposure to the same or similar questions." *Perfect Parts,* 142 F.Supp at 263. The general standard that the bias must be personal and also arise from an extrajudicial source has been stated as the law of this circuit. *United States v. Carignan,* 600 F.2d 762, 763-64 (9th Cir.1979). A judge's participation in a "related or prior proceeding" is not sufficient even though he ruled against one of the present parties in that earlier proceeding. *Davis v. Fendler,* 650 F.2d 1154, 1163 (9th Cir.1981). The dissent appears unwilling to acknowledge that as the law now stands a prior adverse ruling by a judge does not show the judge to be biased.

The point could be raised that the Justices of the Hawaii Supreme Court might be prejudiced because of the publicity attending the reversal in the *Clarke* murder case. The fact of publicity generated by a judge's prior ruling was considered at length in the Watergate case where the defendants included John Ehrlichman, Bob Haldeman and John Mitchell. The Court of Appeals for the District of Columbia, sitting en banc, rejected the defendants' contention that Judge John Sirica had been biased against them because his "public image and reputation" had "become inextricably intertwined with the

prosecution of the Watergate matter." *United States v. Haldeman*, 559 F.2d 31, 137 (D.C.Cir.1976), *cert. denied sub. nom., Ehrlichman v. U.S.*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The court held that this kind of "interest" on the part of the judge was not disqualifying. Interest in order to disqualify must emanate from extrajudicial sources, otherwise "the prohibition would have has a reach far beyond anything Congress could rationally have contemplated." *Id.* The court refused to hold that Judge Sirica had been impermissibly biased. *Haldeman* was favorably cited by Judge Kennedy in *Conforte*, 624 F.2d at 882.

Sensibilities no doubt are changing on the question of judicial bias. In 1765 Blackstone could write: " . . . the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea," 3 W. Blackstone, *Commentaries on the Laws of England* *361. While recusal on the basis of challenge by a litigant has existed in Roman law, canon law, and early English law, it had disappeared by Blackstone's time, *id.*, and was permitted in federal law only in 1911. Since that turning point there have been other signs that judicial disqualification may be looked at more sharply. For example, Judge Aldrich's decision in *Perfect Parts* was criticized by a student writer. Note, "Disqualification of Judges for Bias in the Federal Courts," 79 *Harv.L.Rev.* 1435, 1451 (1966). In 1974 Congress enacted the statute requiring judges to disqualify themselves if a reasonable person could doubt their impartiality. 28 U.S.C. § 455(a). The practice of the Supreme Court in its first century in relation to circuit decisions now looks strange to us. It

may be that the time will come when the participation of panel judges in en banc circuit hearings will appear an impermissible breach of impartiality. It may happen even that prior ruling on a matter will disqualify a judge from sitting on another case involving the same issue. But it is still generally recognized that it is difficult to lay down an absolute rule disqualifying a judge because he has ruled against a litigant in an earlier context. Note, *supra* at 1452. What due process requires is being worked out case by case. Given the history and the current state of law, the federal courts should give the Hawaii Supreme Court a chance to decide what due process requires.

In making that decision, a Justice of the Hawaii Supreme Court will be asking, "Have I so made up my mind by my earlier ruling in the criminal case that I cannot give a fair hearing to Partington's explanation of why he thought his strategy was appropriate?" and "Will public confidence in the courts be diminished if I, a justice who's already found Partington to have given ineffective assistance, now sit on a case where he is defending himself against this charge?" A federal court is not in a position to anticipate how a justice of the Hawaii Supreme Court will answer those questions.

The dissent places weight on a statement in *Withrow*, upholding a procedure in which a later acquittal by the administrative body concerned would not be "lōgically inconsistent" with a prior finding of probable cause. *Withrow v. Larkin*, 421 U.S. 35, 57, 95 S.Ct. 1456, 1469, 43 L.Ed.2d 712 (1975). There would, however, be no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary

proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer. The question of sixth amendment deprivation, decided in *Clarke*, is logically distinct from the disciplinary standards which Partington must meet to satisfy the Bar.

The dissent also places emphasis on the "practical" probability of prejudice. But the dissent admits that a judge may charge an attorney with violating Fed.R.Civ.P. 11, order him to show cause, conduct a subsequent hearing, and find against him. The dissent also admits that a court may cite an attorney for contempt of court, order him to show cause, and then preside over the contempt trial and find against him. As a practical matter, the probability of a judge in these circumstances having in mind a vivid impression of the professional breach of the lawyer, and being influenced by this impression, is much greater than the probability of an appeals court, months or years after the initial decision that occasioned the reference of the lawyer to disciplinary proceedings, being still prejudiced against the lawyer. The dissent is on treacherous grounds when it argues that practical prejudice is more likely in Partington's case that in the cases it accepts as routine judicial practice.

Judges have not been particularly good at recognizing their own biases. The major federal reforms have been made by the legislature – the elimination of Supreme Court Justices reviewing their own decisions in 1891; the introduction of recusal motions by litigants in 1911; the reasonable person test of objectivity in 1974.

This history suggests the need for heightened self-scrutiny. The impartiality that "the common lot of humanity will admit" is now closer to the ideal.

REINHARDT, Circuit Judge, concurring and dissenting.

I concur only in the order set forth at the end of part V of the majority opinion which awards certain costs and attorneys' fees to Partington and the Defense Lawyers. I dissent from the rest of Part V and all of Parts I through IV.

I do not believe that this is one of those exceptional cases in which *Younger* abstention is required. *See World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987). Rather, I believe we should now decide that by virtue of its prior decision in *State v. Clarke*, the Hawaii Supreme Court is biased against Partington on the issue whether he rendered ineffective assistance of counsel and that its holding of a disciplinary hearing would violate his due process rights. After applying the three-part test from *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), the majority concludes that *Younger* abstention is applicable. The majority would permit the Hawaii Supreme Court to resolve the question of its own bias. It reaches this conclusion solely on the basis of its reading of the third part of the *Middlesex* test. As the majority describes that part of the test, the plaintiff must be able "to litigate his federal constitutional claims . . . before a competent and unbiased state adjudicator." Majority op. at 125. Because the majority concludes that

the Hawaii Supreme Court may not be biased on the "constitutional question", it opts for abstention.

The majority misconceives the third part of the *Middlesex* test. Bias plays no role in the application of the three-part test. Rather, bias is an entirely separate matter. Where bias exists, *Younger* abstention is inapplicable, regardless of whether the three-part test is met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975). The bias need not be on any particular claim. All that is necessary to bar abstention is that the Hawaii Supreme Court be biased on the disciplinary proceedings. Here, under Hawaii Supreme Court Rule 13, the supreme court would have to determine whether Partington rendered ineffective assistance of counsel to Clifford Clarke. However, that court has already decided in *State v. Clarke* that Partington's assistance *was* ineffective and that a murder conviction against Clarke must be reversed for that reason.[1] Thus, Partington would be subjected to judgment by a tribunal which has already reached a judgment *on the merits* of his case.[2] Because of its prior actions, the Hawaii Supreme Court is, as a matter of law, a biased forum with respect

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[1] At the oral argument in *State v. Clarke*, one of the justices of the Hawaii Supreme Court accused Partington of misconduct, contending that he had been deliberately ineffective at trial. As discussed in the text, the Hawaii Supreme Court ultimately reversed Clarke's conviction on the grounds that he received ineffective assistance from Partington.

[2] Subjecting Partington to disciplinary proceedings before a biased tribunal would violate his due process rights. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973).

to the Partington proceedings and the federal courts need not abstain.

The majority offers recusal of all of the justices of the Hawaii Supreme Court as a solution to the prejudgment problem. However, the structure of Rule 13 makes it clear that recusal of the entire court is not an available option in this case. Rule 13 was specifically designed to ensure that the justices of the supreme court would make the final determination of ineffective assistance, not a different group of judges. Recusal of the entire court in cases like Partington's would run directly contrary to the language and intent of the rule.

My conclusion that the Hawaii Supreme Court is biased against Partington is not meant to disparage the members of the court. They are undoubtly able individuals and are entitled to a presumption of honesty and integrity. They have no adverse pecuniary interest. Nevertheless, other "[c]ircumstances and relationships must be considered." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue. The disciplinary proceedings must "satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). In *State v. Clarke*, the justices concluded that the legal assistance Partington provided Clarke was ineffective, the very determination they would be called upon to make again in the Rule 13 proceedings. For this reason, a "realistic appraisal of psychological tendencies and human weakness" compels the conclusion that the Rule 13 proceedings involve an intolerably high risk of bias or prejudgment by the Hawaii

Supreme Court. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Under these circumstances, abstract principles of comity, *Younger v. Harris*, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971), as important as they are, do not bar a federal court from exercising its jurisdiction.

In my view, we would not only be performing our duty as a federal court properly, but would be saving the Hawaii Supreme Court the expenditure of much unnecessary time and effort were we to declare Rule 13 unconstitutional now. I see little choice for the Hawaii court when Partington's case reaches the justices. If they fail to invalidate the rule, certainly the federal courts will ultimately be required to do so.

I

RULE 13

Hawaii Supreme Court Rule 13 provides a procedure for determining whether a defense attorney should be disciplined for providing ineffective assistance of counsel. Under the rule, whenever a criminal conviction has been overturned on that ground by either the supreme court or the intermediate appellate court[3], the supreme court appoints a special master to decide whether action against the attorney is warranted. The special master, in turn, appoints a special prosecutor. At the conclusion of the proceedings, the special master dismisses the proceedings or recommends to the supreme court that corrective action be taken against the attorney. Both the

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[3] See note 28, *infra*.

attorney and the special prosecutor may file exceptions to the special master's decision with the court. The supreme court reviews the special master's decision; the Court then makes an independent determination[4] whether the attorney provided ineffective assistance to the defendant and on that basis decides whether to dismiss the proceedings or order corrective action against the attorney.

II

PREJUDGMENT

Clearly, the critical feature of the Rule 13 proceedings is the determination of the Hawaii Supreme Court is required to make with respect to counsel's ineffectiveness. It must make this critical determination regardless of whether it or the intermediate appellate court made the earlier determination that counsel's representation was ineffective, and reversed the criminal conviction on that ground. Here, we are presented with an extreme form of the Rule 13 process: the supreme court, *sua sponte,* raised and determined the ineffectiveness issue during the criminal proceeding; it would now be required to resolve the identical issue a second time in the disciplinary proceeding.

The majority first asserts that *Younger* abstention is appropriate here because "[t]he Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the

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[4] See note 12, *infra.*

criminal case. . . . We cannot and should not guess how the court will respond." Majority op. at 126. Thus, the majority apparently takes the position that Partington must demonstrate not only that the Hawaii Supreme Court has prejudged the merits of the disciplinary proceeding but also that the court has prejudged the issue of *whether* it has prejudged the merits of that proceeding.

The majority's argument misconceives the basic rule governing abstention and biased state tribunals. The fundamental principle is that compelling an individual to present his case to a biased tribunal offends due process and federal courts will enjoin such an unconstitutional proceeding. *Gibson v. Berryhill*, 411 U.S. 564, 570, 577, 93 S.Ct. 1689, 1693, 1697, 36 L.Ed.2d 488 (1973). When a federal claimant alleges that a state adjudicator is biased, it is the federal court which determines whether that allegation is correct. *See Gibson*, 411 U.S. at 578-79, 93 S.Ct. at 1697-98; *see also Kugler v. Helfant*, 421 U.S. 117, 125, 127-28, 95 S.Ct. 1524, 1531, 1532, 44 L.Ed.2d 15 (1975). The question is not referred to the state court. If the federal court concludes that bias exists, the finding of a due process violation follows automatically. *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697.[5] No more is required. The federal court does not abstain.[6] In short, abstention

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[5] *Cf. Kugler*, 421 U.S. at 128, 95 S.Ct. at 1532 (framing the abstention issue as whether the "judicial system provides procedural safeguards to guarantee that [the federal court plaintiff] *will not be denied due process of law* in the state trial or appellate process") (emphasis added).

[6] An exception exists where the state provides an alternate procedure which ensures a fair tribunal in place of the biased

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doctrine does not require a person to ask a tribunal that is biased on the merits of his case whether it is in fact biased. Nor must that person ask the biased tribunal whether the fact that it is biased would violate the due process clause. Clearly, it would – as a matter of federal constitutional law, and a federal injunction, not abstention, is the appropriate remedy.

Indeed, the parallel between Partington's situation and the one considered by the Supreme Court in *Gibson* is striking. *Gibson*, like the present case, was a disciplinary proceeding (license revocation) before a body that was allegedly biased on the revocation issue. Thus, the licensee faced a potential due process violation. Notably, in *Gibson*, the Court did not inquire into whether the state licensing agency was biased on the question of the validity of the challenged statutory procedure. Rather, it considered only the question whether the agency was biased as to "the revocation of appellees' licenses." 411 U.S. at 578, 93 S.Ct. at 1697. Moreover, it held irrelevant the fact that the state courts would review the revocation proceeding de novo. *Id.* at 577, 93 S.Ct. at 1697. Finally, the fact that petitioners had not sought to invalidate the unconstitutional state procedure in the available and unbiased state court forum did not deter the Court from affirming the district court's action enjoining the state proceeding. Procedurally, our case and *Gibson* are identical. In my opinion, *Gibson* is controlling here. If the

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tribunal, *e.g.*, by way of recusal. *See Kugler v. Helfant*, 421 U.S. 117, 127-128, 95 S.Ct. 1524, 1532, 44 L.Ed.2d 15 (1975). The applicability of the recusal exception is discussed in Section III, *infra*.

Hawaii Supreme Court is biased as to Partington's disciplinary issues, the result here should be the same as in *Gibson*; we should not abstain.

The majority attempts to distinguish *Gibson* on the basis that "a tribunal comprised of optometrists does not have the ability to entertain constitutional claims." Majority op. at 127 n. 4. This is not a material distinction. In deciding that *Younger* abstention was inappropriate, the Supreme Court did not even mention the fact that "a tribunal composed of optometrists" cannot hear constitutional claims, let alone rely on that fact (if indeed it is a fact).[7] Rather, the Court found *Younger* abstention unwarranted simply because the state tribunal (composed of optometrists or not) was biased *on the revocation issue*. No more was required to be shown in *Gibson*; no more should be required here. This point can not be overemphasized. If, as appears clear, the Hawaii Supreme Court is biased as to the merits of Partington's disciplinary proceeding, that tribunal is not competent to hear that proceeding – regardless of whether non-merit issues may be raised

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[7] I must confess that I do not know whether the majority's description of the powers possessed, in 1973, by the Board of Optometry under Alabama law is correct. In California until a few years ago, administrative agencies, including licensing boards, *did* have the power (and the duty, I believe) to make rulings on constitutional issues. This was so regardless of whether the board was an industry board or an industry-labor board, composed exclusively of laymen, or some other type of board. The Attorney-General's office provided advice to all these boards on constitutional questions and the boards then made their rulings. Long after 1973, the voters of California adopted an initiative measure removing from all administrative boards, including those composed of lawyers, the power to declare statutes unconstitutional.

during that proceeding, or whether the court is or is not biased as to any of those non-merit issues.

Conversely, the majority asserts that *Younger* abstention is required here because the Hawaii Supreme Court "has the ability to entertain and resolve constitutional claims." Majority op. at 127 n. 4. In essence, the majority appears to be contending that it is proper to force an individual to appear before a biased tribunal in a disciplinary proceeding, so long as that tribunal could conceivably avoid reaching the merits of the proceeding. My reading of *Gibson* leads me to the contrary conclusion. An individual can *not* be summoned before a biased tribunal when the primary issue before the tribunal is the very issue on which it is biased. It is fundamental that compelling an individual to present his case to a biased tribunal offends due process. *Gibson*, 411 U.S. at 570, 577, 93 S.Ct. at 1693, 1697. An individual required to appear before a state tribunal that is biased on the merits of the proceeding may resort directly to federal court, whether or not the state tribunal has the authority to dismiss the proceedings for bias, lack of jurisdiction, or on any other grounds.[8] As *Gibson* illustrates, the fact that there are state remedies for resolving or determining the fairness of the procedure is irrelevant, regardless of when or in what state forum that determination could be made.

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[8] Where state law provides that a biased judge must recuse himself, the state law does *not*, of course, require the individual to appear before a biased tribunal (except, possibly, in some instances for the limited purpose of filing the disqualification motion). The question of recusal is discussed in Section III, *infra*.

In *Gibson*, the Supreme Court stated explicitly that *Younger* abstention is not required "simply because [state] judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings." 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). Moreover, it is clear that the federal court plaintiff in *Gibson* had a completely unbiased state court system in which to seek injunctive relief prior to the administrative proceedings and thus had perfectly adequate state court remedies for his due process claims. For example, he could have asked a state trial or appellate court, rather than a federal district court, to enjoin those proceedings. An unbiased state court is, as the majority points out, generally presumed to be as capable as a federal court of protecting federal constitutional rights. Nevertheless, the Supreme Court in *Gibson* did not require the plaintiff, to first seek relief in state court. Rather, he was permitted to go directly to *federal* court to obtain the appropriate remedy – a federal court injunction against the proceedings in the biased state forum.

The only difference between the facts and circumstances of *Gibson* and those in this case (other than the distinction previously discussed) is that in *Gibson*, the state provided *both* an entirely unbiased state court review of the unconstitutional proceedings *and* an unbiased state court system in which to seek an injunction against the unconstitutional proceedings, while here, there is *neither* an entirely unbiased state forum in which Partington could seek injunctive relief before the unconstitutional proceedings are held *nor* one in which he

could do so afterwards.[9] In Partington's case, the Hawaii Supreme Court is not only the biased forum, but also the first and last judicial body from which Partington may seek relief. Thus, the state court remedies in *Gibson* were, if anything, far *more* hospitable to the plaintiff than those offered to Partington here. As *Younger* abstention was improper in *Gibson*, it is *a fortiori* improper here, if as I conclude, the Hawaii Supreme Court is biased on the ineffective assistance claim.[10]

The majority's confusion regarding abstention and bias appears to be due to its misunderstanding of the third prong of the *Middlesex* test. The majority consistently describes that prong as requiring that Partington have the ability to litigate his constitutional claims before an unbiased state adjudicator. Majority op. at 120-121, 125-126. Actually, the third prong of *Middlesex* does not mention bias – because under *Younger* that issue is dealt with separately. The third prong requires only that Partington have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. The critical fact that the majority overlooks is that in *Younger*, the Supreme Court recognized that even if the three-part test for abstention (as

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[9] I seriously doubt that, as a legal matter, a lower court, in Hawaii or elsewhere, has the authority to enjoin a proceeding before a higher court.

[10] In some instances, a *claim* of bias would be sufficient to preclude abstention, at least until the federal court has had an opportunity to resolve the factual issues relating to the claim. Here, however, there are no factual issues in dispute with respect to the alleged bias.

later described in *Middlesex*) was met, abstention would be improper if the state action was brought in bad faith or for purpose of harassment or in other *extraordinary circumstances*. 401 U.S. at 53-54, 91 S.Ct. at 754-55; *see also Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Bias on the part of the state tribunal is one of those extraordinary circumstances which renders *Younger* abstention inappropriate, even if all three prongs of the *Middlesex* test are met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1531 & n. 4; *cf. World Famous Drinking Emporium*, 820 F.2d at 1082. Thus, it is simply irrelevant whether Partington will be able to raise his constitutional claims before the Hawaii Supreme Court or whether the Court is biased as to those claims; for if the Court has prejudged the merits of the disciplinary proceeding, it is a biased tribunal and *Younger* abstention is inapplicable.[11]

The majority dismisses the Court's statement in *Kugler* that bias is a separate element by calling it dictum. Majority op. at 22 n. 3. Whatever the merits of that categorization, it seems apparent that the Court was correct when it reached its conclusion. *Younger* abstention is barred when, *inter alia*, "extraordinary circumstances" render the proceedings unfair, a concern that is

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[11] It is worth noting that a letter dated April 27, 1987 to Partington from the Chief Justice, a letter the majority appears to accept as the view of the entire court, Majority op. at 126, suggests that the court has in fact prejudged the due process claim. *See* ER 444 (Chief Justice finds "mystifying" Partington's contention that he could not receive an impartial hearing on the ineffectiveness claim). Surprisingly, at a later point in the majority opinion, the letter is summarily dismissed as at most reflecting the opinion of the Chief Justice. Majority op. at 128 n. 7.

independent of whether the federal court plaintiff will have an adequate opportunity in the state proceedings to raise his federal constitutional claims. *Middlesex* listed as examples of this rule a proceeding brought in bad faith or for purposes of harassment. 457 U.S. at 435, 102 S.Ct. at 2522. Certainly a proceeding brought before a biased tribunal is even more unfair to a licensee, and even more violative of his due process rights, than a proceeding that is merely initiated for an improper purpose. In the case of bad faith or harassment, the licensee is required to submit to a proceeding unnecessarily, but should prevail on the merits; in the case of bias, the licensee does not have a fair chance to prevail at all, and an adverse result is, for practical purposes, a foregone conclusion. Thus, the Court's determination in *Kugler* that bias is an "extraordinary circumstance" barring *Younger* abstention was compelled by reason and logic as well as precedent, and the majority clearly errs in rejecting the Court's analysis.

In any event, whether bias is considered separately from the three-prong *Middlesex* test, or whether we disregard the clear language in *Kugler* and consider bias to be a part of the third prong of that test, the result in this case would be the same. As previously discussed, under *Gibson* it is clear that bias on the merits of a disciplinary proceeding is sufficient to preclude *Younger* abstention.

The majority next concludes that the Rule 13 procedure does not present an unacceptable risk of prejudgment on the ineffectiveness issue, although it is far from clear why it reaches that conclusion.[12] Majority op. at 125.

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[12] At one point, the majority argues that Partington has not alleged that the Hawaii Supreme Court is biased "on the

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The majority appears to accept the *Withrow* test, which states that "if the initial view of the facts based on the evidence derived from non-adversarial processes as a *practical or legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question [is] raised." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470 (emphasis added). With respect to the issue of "legal" bias, the majority concludes that Partington has not demonstrated that the Hawaii Supreme Court is legally foreclosed "from considering the ineffectiveness issue de novo." Majority op. at 126. On that point, I am in agreement.[13] However, the majority also concludes that there is

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primary issue . . . [namely] whether corrective action is warranted [against Partington] under Rule 13." Majority op. at 126. Any distinction between whether the court is biased "merely" on the ineffective assistance issue rather than on the corrective action issue is semantic gameplaying at best. I find it hard to believe that anyone would suggest that a court that has prejudged the issue whether Partington rendered ineffective assistance is unbiased on the question whether he should be the subject of disciplinary action. The Hawaii Supreme Court is *necessarily* required to judge the issue on which it is biased *before* determining the appropriate remedy. Obviously, if the court were to decide the issue relating to conduct in Partington's favor, there would be no need for it to reach the question whether corrective action is warranted.

[13] Partington has not demonstrated by unambiguous authority that the court is legally precluded from reconsidering its initial determination of ineffectiveness. For the purposes of our *Younger* analysis, we must assume that the Hawaii

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no "practical" impediment to the Court's examining the issue in a fair and impartial manner. *Id.* at 125, 126. The majority offers *no* explanation for this conclusion, and cites no case law or other authority. In fact, the majority opinion contains no discussion whatsoever of the question whether the Hawaii Supreme Court could, as a practical matter, serve as an unbiased adjudicator. Instead, it avoids the issue entirely, apparently preferring to base its conclusion that Partington will be able to obtain a fair hearing entirely on the supposition that all of the members of the supreme court will recuse themselves.[14] *Id.* at 126.

I believe that, as a practical matter, the Hawaii Supreme Court has prejudged Partington's case. At the very least, there is an intolerable risk of prejudgment. The sole reason Partington is now facing disciplinary proceedings is because in a previous proceeding the Hawaii Supreme Court, *sua sponte,* raised *and decided,* on the merits, the issue of ineffective assistance of counsel in a manner adverse to him. The issue the court previously decided is the identical issue it will now be required to address in the Rule 13 proceedings. In my view, the Hawaii Supreme Court is not, as a practical matter, an unbiased adjudicator.

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Supreme Court is free to reexamine its previous legal conclusion on the question of ineffective assistance. If, however, this assumption turns out to be incorrect, I do not think anyone could argue that the Rule 13 proceeding would satisfy due process.

[14] The question of recusal is discussed *infra,* section III.

There are several federal statutes which are concerned with the issue of judicial bias. *See* 28 U.S.C. §§ 47, 144, & 455 (1982). These statutes are premised on the simple proposition that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). But a fair trial means more than simply the absence of actual bias. "[O]ur system of law has always endeavored to *prevent even the probability of unfairness.*" *Id.* (emphasis added). To this end, "justice must satisfy the appearance of justice." *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). Thus, we must constantly be alert to procedures which "under a realistic appraisal of psychological tendencies and human weakness . . . pose[] such a risk of actual bias or prejudgment that the practice[s] must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.

While we can readily identify the reasons why judicial bias cannot be tolerated, we must still determine when a judge's previous involvement with a case creates such a risk of bias that it would be a violation of due process to allow him to be further associated with the proceedings. Two decisions help frame the issue. Prejudgment, or an unconstitutional risk of prejudgment, has been found where the contents of a speech by a judge "plainly reveale[d]" that he had, prior to the commencement of the proceedings before him, reached a conclusion as to the merits of a case that involved complex questions of fact and law. *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754, 760 (D.C.Cir.1964), *vacated on other grounds*,

381 U.S. 739, 85 S.Ct. 1798, 14 L.Ed.2d 714 (1965).[15] Also, judges have been disqualified from presiding over appeals from decisions in cases, or involving issues, originally tried before them as lower court judges. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 135, 137 (5th Cir.1970) (Order of Disqualification and Memorandum of Decision by Craven, J.) (appeals court must "be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance") (quoting *Moran v. Dillingham*, 174 U.S. 153, 19 S.Ct. 620, 43 L.Ed. 930 (1899)).[16]

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[15] Our present Chief Justice has said that the mere fact that a judge has expressed an opinion on a purely legal question would not demonstrate bias or prejudgment, *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (memorandum on recusal by Rehnquist, J.). We have reached the same conclusion. *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). The situations discussed by Justice Rehnquist and by this court in *Conforte* were far different from the one present in *Texaco*. *Conforte* is discussed further *infra*, note 20.

[16] In *Swann*, Judge Craven applied 28 U.S.C. § 47, which explicitly forbids the practice of a judge hearing an appeal from a case which he tried. The same result has been reached through application of 28 U.S.C. § 455, which requires a judge to recuse himself to avoid the appearance of impropriety. *Rice v. McKenzie*, 581 F.2d 1114, 1116-18 (4th Cir.1978) (federal judge, who, as chief justice of state supreme court, had presided in affirming appeal of convicted person was disqualified from federal habeas corpus proceedings because of concerns with impartiality). *Cf. Withrow*, 421 U.S. at 58 n. 25, 95 S.Ct. at 1470 n. 25 ("when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review").

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While *Texaco* and *Swann* provide some guidance, there are significant differences between those cases and Partington's. The commissioner's prejudgment in *Texaco* was extrajudicial; the remarks were made during a public appearance and were not based on knowledge the commissioner obtained during an official proceeding. *Cf. United States v. Studley*, 783 F.2d 934 (9th Cir.1986). *Swann* was concerned with the issue of what constitutes a meaningful review by a higher court of a lower court's decision. In the present case, the issue is: when is a court that is called upon to decide a complex question of law and fact as to which it has already reached a final determination in an earlier proceeding presumed to have prejudged the question?

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In light of current practice, the comments in the concurring opinion on the history of the practice of the Supreme Court acting "as a court of appeals from decisions of circuit courts made by the Justices as circuit judges," Concurring op. at 132, and specifically its discussion of *Stuart v. Laird*, 1 Cranch 298 (1803), and *The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825), while interesting, shed no light on the specific issue before us. Just as our view of the slave trade has changed from that espoused in *The Antelope*, so too has our view of the propriety of judges sitting in judgment on their own decisions. Moreover, in *The Antelope*, no challenge was made to the individual Justice's participation in an appeal from a case in which he had sat as a circuit judge; perhaps more interestingly, in *Stuart*, "[t]he Chief Justice, having tried the cause in the court below, declined to give an opinion." *Id.* at 306. Most importantly, in neither case did the Justices even consider the question we are presented with, that is, whether a court comprised wholly of judges who decided the same case at a lower judicial level may hear an appeal of that lower court decision, and certainly the concurring opinion does not suggest that any such practice ever existed.

Although *Texaco* and *Swann* are not dispositive, the policies which underlie them compel the conclusion that the Hawaii Supreme Court is biased in this case. The common thread that links *Texaco* and *Swann* is the concept that no person can be compelled to litigate a controversy before a judge whose prior conduct or connection with the case makes it likely that he will have prejudged the outcome. The reason that due process does not permit a judge to hear an appeal of a case he previously tried as a lower court judge has been well stated. "Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published opinion." *Swann*, 431 F.2d at 137 (quoting an address by Walter B. Hill to the American Bar Association). The concerns reflected in *Swann* relate not only to the risk that a judge will have actually prejudged a case, but to the appearance of partiality as well. As the Supreme Court made abundantly clear in *In re Murchison*, "justice must satisfy the appearance of justice." 349 U.S. at 136, 75 S.Ct. at 625.

Here, the court which will decide in the disciplinary proceeding whether Partington provided ineffective assistance of counsel is the same body that has already determined in *State v. Clarke* that Partington did precisely that.[17] It has also issued an opinion to that effect and has

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[17] The concurring opinion suggests at one point that prejudgment "must be based upon something other than rulings in the case." Concurring op. at 133, *quoting Berger v. United States*, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921); *see also Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981) (judge's participation in prior or related proceeding not sufficient to

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reversed a murder conviction on that ground. These circumstances present an unacceptable risk of prejudgment, one that neither Partington nor any other litigant should be required to assume. They also fall far short of satisfying "the appearance of justice".

The conclusion that the Hawaii Supreme Court does not qualify as an impartial body insofar as Partington's Rule 13 proceeding is concerned finds strong support in *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In *Withrow*, the Court considered whether the combination of investigative and adjudicative functions in a state administrative agency violated due process. It suggested that bias or prejudgment would be established if an initial accusatory finding foreclosed, as a practical matter, a later adjudicatory finding to the contrary.[18] *Id.* at 58, 95 S.Ct. at 1470. The Court concluded that the state practice did not violate due process, because the initial investigative decision was one of probable cause, a determination that would not be logically inconsistent with a subsequent adjudicatory determination of "no violation". *Id.* at 57, 95 S.Ct. at 1469. Or, as the Court put it, a favorable second decision would not constitute an implicit admission that the first was erroneous.

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constitute bias). However, none of the cases the concurring opinion relies upon (with one exception) involves a situation in which, as here, the judges will be called upon to determine the same complex question of fact and law on which they previously reached a final determination. The one exception, *Denis v. Perfect Parts, Inc.* 142 F.Supp. 263 (D.Mass.1956), is discussed in note 20, *infra*.

[18] The majority apparently does not disagree with this suggestion. *See* Majority op. at 124, 126.

Here, the Hawaii Supreme Court has not merely made a preliminary or accusatory finding that Partington *may have* rendered ineffective assistance of counsel. Rather, it has made a finding *on the merits* that the assistance Partington rendered was so ineffective as to require the reversal of a murder conviction. Certainly, a subsequent finding by that same court in a Rule 13 proceeding that Partington had not rendered ineffective assistance of counsel would be logically inconsistent with its prior finding.[19] The Court would "implicitly be admitting error in its prior finding."[20] *Id.* 421 U.S. at 57, 95 S.Ct. at 1469.

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[19] None of this discussion is meant to minimize the problem of ineffective assistance of counsel for criminal defendants, nor to suggest that the Hawaii Supreme Court cannot fulfill its duty to supervise attorney conduct. Nevertheless, the Court cannot exercise its authority in a manner which violates the requirements of due process. A Rule 13 procedure can undoubtedly be devised which meets those requirements. *See infra* pages 146-147.

[20] The concurring opinion concludes that there would be "no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer." Concurring op. at 134 (emphasis in original). The logic of this statement escapes me. If the court determines that Partington's strategy was reasonable and that it justified his trial tactics, I do not see how it could also say that there was a sixth amendment violation. If the strategy justified the tactics, then the assistance was *not* ineffective.

The concurring opinion also concludes, without analysis, that the fact that the Hawaii Supreme Court has already reversed a murder conviction because the defendant received

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The concept of "logical inconsistency", emphasized in *Withrow*, helps distinguish this case from cases holding

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ineffective assistance from Partington does "not constitute disqualifying bias [on the part of the members of the court] because it is not the kind of aversion or hostility that a fair-minded person would be unable to set aside." Concurring op. at 132. However, the case that it relies on, *United States v. Conforte*, 624 F.2d 869 (9th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980), involved a type of prejudgment wholly unlike the prejudgment present in this case. In *Conforte*, the alleged bias was *personal* – the trial judge had allegedly made derogatory statements about the defendant some years prior to the time when the defendant appeared before the judge. 624 F.2d at 878-79. We held that the bias alleged was not sufficient to require recusal, and that disqualification for *personal* bias required "an animus more active and deep-rooted than an attitude of [non-racial] disapproval toward certain persons because of their known conduct." *Id.* at 881 However, the question of the depth of personal animosity required to constitute disqualifying bias bears no relationship to the question whether a court has actually prejudged the merits of the case before it because it has rendered a final decision in a previous case on the same issue it is now called upon to decide.

The only case that the concurring opinion relies on that is at all factually similar to our case is *Denis v. Perfect Parts, Inc.*, 142 F.Supp. 263 (D.Mass.1956). In that case, the district judge declined to recuse himself at the request of the defendant, although he would be called upon to determine the validity of a patent which he had declared valid in a previous case that involved the same plaintiff but a different defendant. *Id.* at 263. The Judge declined to disqualify himself, because he concluded that 28 U.S.C. § 144, the disqualification statute, "is directed to personal bias, not to previous exposure to the same or similar questions." *Id.* The judge believed that a contrary

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that a judge who initiated the proceedings may preside at the hearing on the merits.[21] For example, a judge who charges an attorney with violating Rule 11 and orders him to show cause is permitted to conduct the subsequent hearing. *See, e.g., Tom Growney Equipment, Inc. v. Shelley Irrigation Dev. Inc.*, 834 F.2d 833 (9th Cir.1987). A determination by the judge at the later hearing that Rule 11 sanctions are not appropriate would not be inconsistent with his issuance of the initial charge. The initial charge or finding is similar to one of probable cause, while the later determination on the merits is akin to one of guilt or innocence. Similarly, when a court cites an attorney for contempt, orders him to show cause, and then presides over the contempt trial, *e.g., Nilva v. United*

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result would minimize or eliminate the value of judicial experience and exposure. *Id. Denis* would thus suggest a different result than the one that I reach here. However, as the concurring opinion points out, "[s]ensibilites no doubt are changing on the question of judicial bias." Concurring op. at 133. Indeed, the author of the opinion in *Denis* has expressed considerable doubt about the decision he reached in that case. *See Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.1977). Thus, *Denis*, while never controlling on this court, cannot any longer even be considered persuasive.

[21] Although Judge Noonan does not disagree with the use of the "logical inconsistency" standard, he would seem to rely on each individual justice's view as to whether he has prejudged Partington's case. *See* Concurring op. at 134. This conclusion appears to be at odds with the prevailing notion that an objective standard is to be used. *See, e.g., Berger v. United States*, 255 U.S. 22, 33-34, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921); *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.) *cert. denied* 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980); 28 U.S.C. § 455 (1982); *see also* Concurring op. at 134.

States, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415 (1957), a finding of not guilty is not logically inconsistent with the fact that a charge was preferred. Another example is the issuance of a preliminary injunction by a judge who subsequently presides over a trial in which he determines whether a permanent injunction should issue. This practice is proper because the question at the hearing on the preliminary injunction is solely one of "reasonable cause"; no determination on the merits is made at that time. Thus, there is ordinarily neither the appearance nor the reality of logical inconsistency or prejudgment in any of the above cases when the merits are heard.[22]

At first glance, a more troublesome analogue is presented when a trial judge presides over a trial for the second time after his initial decision has been reversed on appeal. This practice does not generally create a risk of bias or prejudgment implicating due process concerns.[23]

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[22] It is worth noting that the judge who initiates the contempt proceedings is not always permitted to preside over them. For example, if "the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent." Fed.R.Crim.P. 42(a). *See also In re Murchison*, 349 U.S. 133, 137, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (trial for contempt during grand jury proceedings before same judge who acted as one-man grand jury violates due process because "[h]aving been a part of that process a judge cannot be . . . wholly disinterested in the conviction or acquittal of those accused").

[23] Of course, an appellate court may, under its supervisory powers, reassign the case on remand to a different trial judge, if it determines under the circumstances of the case that allowing the same judge to rehear the case poses an unacceptable

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See, e.g., NLRB v. Donnelly Garment Co., 330 U.S. 219, 236, 67 S.Ct. 756, 765, 91 L.Ed. 854 (1947); *United States v. Hollis*, 718 F.2d 277 (8th Cir.1983), *cert. denied*, 465 U.S. 1036, 104 S.Ct. 1309, 79 L.Ed.2d 707 (1984). However, our judicial system has built-in mechanisms that serve to protect litigants against the risk of prejudgment in such cases, and help to maintain the appearance of impartiality. When a trial judge presides over a trial after remand, intervening appellate guidance significantly minimizes the risk of bias. The trial judge is advised that his initial decision was incorrect, and receives specific guidance from the reviewing court as to the aspects of the trial which created reversible error. Usually, the trial judge is also given specific instructions as to what remedial or corrective actions should be taken in the second trial. In addition, the decision in the second trial will itself be subject to judicial review. That review also serves as an independent restraint on the trial judge, because he will be aware that evidence of bias or prejudgment on his part will lead to a second reversal.[24]

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risk of bias. *See, e.g., Smith v. Mulvaney*, 827 F.2d 558, 562-63 (9th Cir.1987).

[24] The practical reality of retrying numerous cases after appeal virtually requires that, with appropriate safeguards, our judicial system allow the same judge who presided over the first trial to preside again after appeal. *United States v. Harris*, 458 F.2d 670, 678 (5th Cir.) (" 'used' judges must simply be recycled" to avoid problem of no judge in a particular venue being able to hear a litigant's case), *cert. denied*, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972). Neither the courts generally nor Hawaii courts in particular face a comparable practical problem with respect to the adjudication of disciplinary cases.

None of the procedures which serve to eliminate or reduce the risk of prejudgment when a trial judge rehears a case following reversal or remand are applicable in Rule 13 proceedings. Under Rule 13, there is no superior authority that will have informed the supreme court that its initial decision was incorrect prior to the time it hears the issue for the second time; no higher court will have explained to the Hawaii Supreme Court the nature of its errors in the initial proceedings or provided it with guidance as to those errors. Nor will the supreme court have had the benefit of specific instructions as to how to conduct the second proceeding. While remand to a trial court occurs because that court's initial decision has been found to be incorrect and has been reversed, no comparable events will have occurred here. To the contrary, the disciplinary proceedings will take place here because the Hawaii Supreme Court's determination of ineffective assistance has *not* been vacated or set aside by a higher court. Equally important, the supreme court's determination in the Rule 13 proceedings will be final, with no right of appeal to a superior judicial body.[25]

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[25] The concurring opinion suggests that our current en banc practice also presents a troublesome analog. Concurring op. at 131-133. However, that circumstance is wholly different from the one with which we are now confronted. When a circuit court sits en banc, the court *rehears* the case at issue, just as the original panel may. The en banc judges do not, as the Hawaii Supreme Court under Rule 13 is required to do, decide a complex issue of fact and law on which the court has already reached a *final* determination in a *prior* case. The practice of granting a rehearing in a pending case poses none of the problems presented by a court requiring a party to submit to it for decision an issue on which the court has already rendered a final decision adverse to that party.

For the reasons discussed above, I cannot agree that Partington must show more than the fact that the Hawaii Supreme Court is biased on the merits of the disciplinary proceeding. Nor can I agree that Partington has failed to establish the existence of that bias. In my opinion, the court's prior determination in *State v. Clarke* that Partington provided ineffective assistance would "give[ ] fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *United States v. Haldeman*, 559 F.2d 31, 136 (D.C.Cir.1976) *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The Supreme Court has warned us to "be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Withrow*, 421 U.S. at 54, 95 S.Ct. at 1468. The majority fails to consider sufficiently the nature of the triggering determination in Rule 13 proceedings, and thus gives short shrift to the very real problem of prejudgment the rule presents. The Supreme Court has held that, if a state administrative agency is biased, *Younger* abstention is inappropriate even if state "judicial review, *de novo* or otherwise, would be forthcoming at the close of the administrative proceedings." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). The same conclusion holds true *a fortiori* where, as here, the biased decision of a court will not be subject to *any* review.[26]

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[26] The majority opinion contends that Hawaii's Rule 13 disciplinary procedure is "strikingly similar" to the New Jersey disciplinary proceeding which the Supreme Court held, in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), provided a

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III

RECUSAL

In concluding that Partington will be able to bring his claims before an impartial tribunal, the majority does not determine whether the justices of the Hawaii Supreme Court have, as a *practical* matter, prejudged his claim; nor does it consider whether disciplinary proceedings before those justices would give the requisite appearance of impartiality. *See* Majority op. at 120. Rather, its conclusion is based entirely on Partington's supposed ability to obtain the recusal under Haw.Rev.Stat. § 601-7(b) (1985) of all five of the justices of the court.[27] Majority op. at

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charged attorney with an adequate opportunity to raise his constitutional claims. Majority op. at 121. However, any "similarity" between the two systems is at most superficial, and in any event irrelevant to the question of prejudgment.

Under the New Jersey attorney disciplinary system, a local Ethics Committee is authorized to receive complaints about attorney misconduct. It then makes an initial determination whether an attorney should be disciplined for unethical conduct. 102 S.Ct. at 2518. If the Committee determines that disciplinary action is warranted, it prepares a presentment for the Disciplinary Review Board. *Id.* at 2518-19. The Review Board then decides what disciplinary action, if any, is warranted. The New Jersey Supreme Court's *first* involvement with the proceedings is when it reviews the Review Board's decision. *Id.* at 2519.

[27] Although the majority refers to Partington's ability to seek recusal of "*certain* members of the Supreme Court [who] may be personally biased against him . . . by virtue of their finding of ineffectiveness of counsel in *State v. Clarke*," Majority op. at 127 (emphasis added), the opinion in *Clarke* shows that *all* of the justices found that Partington's assistance was ineffective. ER 158-59.

126-128. In short, the majority appears to assume that some group of judges other than the sitting supreme court justices will hear Partington's case. Once again the majority does not discuss the legal issue involved, that is, whether Hawaii's recusal statute is applicable here; this time it simply asserts, *ex cathedra*, that it is.

Hawaii law provides for recusal of the entire court "[w]hen necessary." Haw.Rev.Stat. § 602-10. On its face, this language would seem to support the majority's position. But recusal statutes are generally addressed to claims of bias in individual cases, that is, the problem of alleged bias on the part of some or all of the justices arising from the peculiar facts of an individual case or group of related cases. *Cf.* C. Wolfram, *Modern Legal Ethics* 982-99 (1986) (discussion of disqualification of judges for interest or bias contains no mention of types of bias other than individual). Rule 13 presents a very different problem than is usually addressed under recusal statutes. Under Rule 13, prejudgment is not the exceptional case, arising only under unusual circumstances. Rather, the conflict the Hawaii Supreme Court justices are confronted with in Partington's case is the *inevitable* result of the way the rule is structured. That structure ensures that prejudgment will be endemic in disciplinary cases. Far from being a random occurrence during a particular Rule 13 proceeding, prejudgment is the institutional norm.

Under Rule 13, the Hawaii Supreme Court makes the final determination in all disciplinary proceedings as to whether an attorney provided ineffective assistance of counsel. The event that triggers the Rule 13 proceedings is a determination, made in a criminal proceeding, by the supreme court or the intermediate appellate court or both

that the attorney did in fact provide ineffective assistance.[28] The supreme court may have been the first court to make that determination in the criminal proceeding or it may have affirmed the finding of the intermediate court.[29] Wherever or however the determination of ineffectiveness was made in the criminal proceeding, Rule 13 vests the Hawaii Supreme Court with the authority to make the subsequent ineffectiveness determination in the disciplinary proceedings.

As already noted, the majority contends that recusal of all of the Hawaii Supreme Court justices will solve whatever bias or prejudgment problem Partington may face. However, the majority's "solution" would not apply to Partington's case only. It would require the recusal of every member of the supreme court in every case which was initiated because the supreme court had made or affirmed the triggering ineffectiveness finding. *All* such cases would be heard by judges who are not sitting members of the Hawaii Supreme Court. Such a procedure

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[28] Disciplinary proceedings are instituted whenever such a determination is made and the criminal conviction is reversed. Haw.S.Ct.R. 13. Conceivably, in rare instances the reversal of a conviction on the ground of ineffective assistance of counsel could originate in the trial court. However, in such cases, there is still a reasonable possibility that the determination will subsequently be affirmed (or reversed) by the intermediate appellate court, the supreme court, or both. Accordingly, there is no need to consider these cases separately, and they are subsumed within the discussion contained in the text.

[29] Of course, where the intermediate appellate court makes the determination in the criminal proceeding and the decision is not reviewed by the supreme court, no due process issue is presented by the provisions of Rule 13.

would be directly contrary to the disciplinary system the Hawaii Supreme Court actually enacted, a disciplinary system which contemplates a final determination by the supreme court in *all* cases. The majority's assertion that the recusal statute is applicable here is simply incompatible with the language and intent of Rule 13.

A Rule 13 system could easily have been devised under which the supreme court would make the determination of ineffective assistance of counsel in a disciplinary proceeding if the original finding of ineffectiveness had been made in an unappealed decision of the intermediate appellate court, and the intermediate appellate court would make the disciplinary determination if the supreme court had originated the earlier ineffective assistance finding.[30] But the Hawaii Supreme Court chose not to enact such a system. Instead, it chose to make itself the final judge of whether an attorney had provided ineffective assistance in all cases – those in which it had made or affirmed the earlier determination that the attorney was in fact ineffective as well as those in which only the intermediate appellate court had made such a determination. Rule 13 explicitly provides that the disciplinary proceeding be adjudicated by the supreme court, not by appellate court judges or retired supreme

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[30] If the intermediate appellate court had made the initial ineffectiveness finding and the Hawaii Supreme Court had affirmed, neither the supreme court justices nor the appellate court judges who participated in the criminal proceedings could be involved in the disciplinary case. However, other active appellate court judges as well as retired supreme court justices, retired appellate court judges, or active or retired circuit court judges would be eligible, if authorized by a revised Rule 13.

court justices. If, when it adopted rule 13, the Hawaii Supreme Court had intended that intermediate court judges or retired supreme court justices adjudicate the disciplinary proceedings which had been initiated because of a finding made by the supreme court, it would certainly have included a provision to that effect in the text of the rule.[31]

It is clear that the Hawaii Supreme Court did not intend the recusal statute to be applicable in cases such as Partington's because application of the statute to such cases would do precisely what the court refused to do when it enacted Rule 13. It would require that disciplinary proceedings arising out of reversals ordered by the supreme court, or out of cases in which the supreme court upheld a reversal ordered by a lower court, be adjudicated by a group of judges who are not active members of the court. The majority errs in attempting to save Rule 13 by presuming the applicability of Hawaii's recusal statute.[32] The proper course would be to

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[31] For the same reason, it would not be reasonable to suggest that the court had the recusal statute in mind when it drafted Rule 13, and that it therefore expected retired justices or active circuit judges, *see* Haw.Rev.Stat. § 602-10, to hear those disciplinary cases which result from criminal proceedings which have previously reached the supreme court level. That class of cases constitutes far too significant a part of the potential pool to have been overlooked by the court or excluded *sub silentio* from the regular procedure.

[32] The Supreme Court has held that the ability to seek recusal is sufficient to protect due process requirements. *Kugler v. Helfant*, 421 U.S. 117, 130-31, 95 S.Ct. 1524, 1533-34, 44 L.Ed.2d 15 (1975). In *Kugler*, the Supreme Court affirmed the

(Continued on following page)

invalidate the rule and permit the Hawaii Supreme Court to reenact a version that does not offend due process.

IV
CONCLUSION

Certainly, judges are entitled to a presumption of absence of bias, *see Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982), as well as one of integrity and honesty. *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. They are also entitled to a presumption that they will follow their duty to "be unswayed by partisan interests, public clamor, or fear of criticism." Haw.S.Ct.R. 8.5(a)(5), *incorporating* Code of Judicial Conduct, Canon 3(A)(1). But such a presumption "does not, of course, preclude a court from determining from the special facts

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(Continued from previous page)

district court's dismissal of a complaint on the basis of *Younger*, emphasizing that recusal would solve any due process problem that might arise from the possibility of bias on the part of individual members of the New Jersey Supreme Court. *Id.* *Kugler* involved an individual instance of bias, not the systemic bias present here. Because Rule 13 contemplates that the Hawaii justices will determine the question of ineffective assistance of counsel under that rule and not that they will all be recused from hearing such cases when the triggering determination has been made by the Hawaii Supreme Court, recusal is not an available option here. Thus, *Kugler* is inapplicable. In addition, this court has held that a plaintiff's failure to utilize state disqualification procedures will prevent us from making a determination whether his case fits the bias exception to *Younger*. *Flangas v. State Bar of Nevada*, 655 F.2d 946, 950 (9th Cir.1981). However, *Flangas*, like *Kugler*, involved an individual instance of bias to which the state recusal statute was clearly applicable.

and circumstances present in the case before it that the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470. This is just such a case. Under Rule 13, the Hawaii Supreme Court would be called upon to determine whether Partington rendered ineffective assistance of counsel, despite the fact that it has previously determined, in reversing a murder conviction, that he did precisely that. While I have no doubt that the justices of the Hawaii Supreme Court would attempt to comply with their duty to be impartial, the risk of prejudgment on the part of the court is too great. So, too, is the price the courts would pay for failing to preserve the appearance of justice.

The majority's suggestion that Partington must now present his arguments to a tribunal that has prejudged the merits of the disciplinary proceedings because he has not shown that the tribunal is biased on the issue of whether it is biased, misconceives the law of abstention. Partington has shown all that he need show in order to obtain a federal court injunction – he has shown that the state tribunal has prejudged the merits of the disciplinary proceedings. *See Gibson*, 411 U.S. at 577-78, 93 S.Ct. at 1697. I see no legal or practical reason for forcing Partington to first present his claims to the Hawaii Supreme Court.

Although the majority posits recusal of all of the justices as a possible solution to the prejudgment problem, it offers no support for the assumption that Hawaii's general recusal statute is applicable. In fact, the structure of Rule 13 compels the conclusion that this remedy is simply not available here. Rule 13 explicitly requires that the Hawaii Supreme Court adjudicate all cases arising

under the rule, not that the determination be made by an entirely different group of judges whenever the initial determination was made or affirmed by the supreme court.

For these reasons, the Hawaii Supreme Court simply cannot be said to provide Partington with an unbiased forum insofar as the disciplinary proceedings are concerned. Accordingly, *Younger* abstention is inappropriate.[33] I would reverse the district court's decision and remand the case to that court with instructions to enjoin the Rule 13 proceedings.

SANCTIONS

While I agree with the majority that sanctions against Chang and Gedan are appropriate, I cannot agree that Rule 11 is a proper basis for imposing them. Certainly, Rule 11 was not the basis the Seventh Circuit relied upon in *Meeks v. Jewel Cos., Inc.*, 845 F.2d 1421, 1422 (7th Cir.1988), a case the majority cites as precedent for its sanctioning of Chang and Gedan. The Seventh Circuit has made it abundantly clear that Rule 11 does not apply to proceedings before courts of appeals. *See, e.g., Leigh v. Engle*, 858 F.2d 361, 370 n. 5 (7th Cir.1988), *cert. denied*,

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[33] Because the Hawaii Supreme Court is biased for the reasons explained above, it is not necessary to decide whether it is also biased as to Partington's equal protection claim. Nevertheless, the April 27, 1987 letter to Partington from the Chief Justice strongly suggests that the Court has prejudged that issue as well. *See* note 11 *supra* and ER 446 (stating reasons that Rule 13 need not be applied to prosecuting attorneys as well as to defense attorneys).

___ U.S. ___, 109 S.Ct. 1528, 103 L.Ed.2d 833 (1989); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 306 n. 6 (7th Cir.1988); *Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir.1988).

The majority attempts to avoid this problem by stating that, unlike the Seventh Circuit, this circuit has adopted Rule 11 for proceedings before this court. However, the cases cited by the majority, *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302, 304-05 (9th Cir.1987); and *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), when properly analyzed, do not stand for this broad proposition. Rather, in each of these cases, the objectionable conduct for which the attorney was sanctioned occurred in the district court.[34] Here, in contrast, the sanctionable conduct took place exclusively in the court of appeals: Chang and Gedan filed a frivolous motion for sanctions against Partington for bringing this appeal. I do not believe that we can properly adopt Rule 11 for appellate proceedings through the exercise of our decision making function. Rule 11 is applicable to actions taken in the district courts not the bankruptcy courts, *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir.1987); Fed.R.Civ.P. 81(a)(1), or the courts of appeals. *Leigh; Borowski; Hays.* If a rule similar or identical to Rule 11 is to be made applicable to federal appellate courts generally, an amendment to the Federal Rules of Appellate Procedure will be required. If, on the other hand, a

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[34] While *In re Curl* is at best ambiguous, it appears that the principal conduct the attorney was sanctioned for in that case was the filing in the district court of a frivolous notice of appeal.

judge of this court believes that our court should adopt such a rule for ourselves, he should request our Advisory Committee on Rules to act. However, even if we could extend Rule 11 to appellate proceedings, it would be unwise to do so. The satellite litigation we would be inviting is not worth the candle.

Of course, this still leaves the question of what the proper basis for our imposition of sanctions against Chang and Gedan should be. While *Meeks* did not make clear what basis the Seventh Circuit relied upon to grant sanctions, there are several options available to us: Fed.R.App.P. 46(c); 28 U.S.C. § 1927; or our inherent powers. Unwarranted sanctions motions serve to multiply proceedings unnecessarily and to harass one's opponent. Because I believe that Chang and Gedan's filing of a motion for sanctions against Partington for bringing this appeal was unreasonable and vexatious, I would impose sanctions pursuant to 28 U.S.C. § 1927.

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 (Filed June 19, 1991)

MOTION TO VACATE JUDGMENT AND MODIFY MEMORANDUM OPINION OF DECEMBER 27, 1985 (IN NO. 10041), AND TO VACATE JUDGMENT AND MODIFY MEMORANDUM OPINION OF OCTOBER 5, 1987 (IN NO. 11633), AND FOR WRIT OF PROHIBITION DIRECTED TO CHIEF DISCIPLINARY COUNSEL GERALD H. KIBE AND ASSISTANT DISCIPLINARY COUNSEL CHARLENE M. NORRIS

MEMORANDUM OF POINTS AND AUTHORITIES

AFFIDAVIT OF EARLE A. PARTINGTON

AFFIDAVIT OF KAREN A. ESSENE

EXHIBITS 1 - 8

and

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NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)	CR. NO. 59285

MOTION TO VACATE JUDGMENT AND MODIFY MEMORANDUM OPINION OF DECEMBER 27, 1985 (IN NO. 10041), AND TO VACATE JUDGMENT AND MODIFY MEMORANDUM OPINION OF OCTOBER 5, 1987 (IN NO. 11633), AND FOR WRIT OF PROHIBITION DIRECTED TO CHIEF DISCIPLINARY COUNSEL GERALD H. KIBE AND ASSISTANT DISCIPLINARY COUNSEL CHARLENE M. NORRIS

COMES NOW Attorney Earle A. Partington and respectfully moves this Honorable Court for an order (1) vacating the Judgment and Notice of Judgment filed January 20, 1986, and modifying the Memorandum Opinion of this Court filed on December 27, 1985 (in No. 10041), by withdrawing all of the Opinion after the first paragraph save and except the last sentence which reads "Reversed and remanded."; (2) vacating the Judgment and Notice of Judgment filed November 16, 1987, and modifying the Memorandum Opinion of this Court filed on October 5, 1987 (in No. 11633), by deleting the following words in the second sentence of the first paragraph: "because of the ineffective assistance of appellant's trial

counsel"; and (3) issuing a writ of prohibition directed to Chief Disciplinary Counsel Gerald H. Kibe and Assistant Disciplinary Counsel Charlene M. Norris prohibiting them: (a) from using in any manner whatsoever in the pending HSCR 2 proceeding against Earle A. Partington the *sua sponte* finding made by this Court in No. 10041 against Earle A. Partington in its Memorandum Opinion filed December 27, 1985, (b) from using in any manner whatsoever in the pending HSCR 2 proceeding against Earle A. Partington the Decision and Order of Special Master filed July 31, 1990, in No. 10041, and (c) from asserting Defendant Clifford M.M. Clarke, Sr.'s constitutional rights over his objection.

This motion is made pursuant to Rule 27(a) of the Hawaii Rules of Appellate Procedure and is based on the affidavits of Earle A. Partington and Karen A. Essene, Exhibits 1 through 8, and Memorandum of Points and Authorities attached hereto, and the record and file in these cases.

DATED: Honolulu, Hawaii, June 16, 1992.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	))))))))	CR. NO. 59285

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION; RELIEF SOUGHT; AND JURISDICTION

A. INTRODUCTION

On December 27, 1985, this court in No. 10041 *sua sponte* made an adjudication against movant attorney

Earle A. Partington that he had rendered ineffective assistance of counsel to Defendant Clarke in Clarke's first trial. Partington had no opportunity to defend himself and, in fact, this court had denied him a hearing on this issue in No. 10041 prior to rendering the adjudication. The adjudication triggered a proceeding against Partington pursuant to Hawaii Supreme Court Rule (HSCR) 13, but the HSCR 13 proceeding still offered Partington no opportunity to defend himself for, as this court found in its order of September 24, 1990, HSCR 13 proceedings are *not* conducted de novo on the issue of whether ineffective assistance was rendered. The HSCR 13 special master had purported to conduct a de novo hearing, but the master's July 31, 1990, decision and order was declared a nullity by this court's order dismissing the proceeding on September 24, 1990.

On July 9, 1991, Chief Disciplinary Counsel Gerald H. Kibe and Assistant Disciplinary Counsel Charlene M. Norris of this court's Office of Disciplinary Counsel (ODC) filed a petition against Partington pursuant to HSCR 2. The petition (*see* Exhibit 1, attached hereto) alleges as misconduct the same conduct of Partington which had been the subject of the HSCR 13 proceeding, although how or why Partington's conduct was improper is nowhere set out. Over the objections of Defendant Clarke, who has never complained against Partington, Kibe and Norris are purporting to assert Clarke's federal and state constitutional rights to the effective assistance of counsel in his first trial and, on that basis alone, are alleging that Partington violated the Hawaii Code of Professional Responsibility.

Kibe and Norris have *no* competent evidence whatsoever that Partington violated the Code of Professional Responsibility in his handling of Clarke's first trial, and, as will be set out *infra*, all of the tactics at issue are perfectly legitimate and ethical trial tactics, as a matter of law. While pretending that the HSCR 2 proceeding will be conducted de novo, as contemplated by this court's rules, it is undisputed that Kibe and Norris will offer as "evidence" in the HSCR 2 proceeding (1) this court's *sua sponte* finding against Partington of December 27, 1985, and (2) the HSCR 13 special master's decision and order of July 31, 1990. As will be shown here, the HSCR 2 proceeding against Partington cannot possibly have been brought in good faith. That being so, Kibe and Norris filed the petition against Partington in bad faith for purposes of harassment.

B. RELIEF SOUGHT

Partington seeks the following relief from this court:

1. In No. 10041, that the Judgment and Notice of Judgment filed January 20, 1986, be vacated;

2. In No. 11633, that the Judgment and Notice of Judgment filed November 16, 1987, be vacated;

3. In No. 10041, that the memorandum opinion be amended to delete any reference to ineffective assistance of counsel;

4. In No. 11633, that the memorandum opinion be amended to delete the reference to ineffective assistance of counsel in No. 10041;

5. That thereafter new judgments and notices of judgment, identical to the present judgments and notices of judgment save for the dates, be filed in Nos. 10041 and 11633;

6. In No. 10041, that this court issue a writ of prohibition directed to Kibe and Norris prohibiting them in the HSCR 2 proceeding against Partington from asserting Defendant Clarke's constitutional rights over Clarke's objection, and from utilizing in any manner:

(a) the *sua sponte* adjudication of ineffectiveness of December 27, 1985; and

(b) the HSCR 13 special master's decision and order of July 31, 1990.

C. JURISDICTION

Jurisdiction for this court to act in this matter lies under HRS § 602-5, which includes the following provisions:

> § 602-5 **Jurisdiction and powers.** The supreme court shall have jurisdiction and powers as follows:
>
> * * *
>
> (6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court;
> (7) To make and award such judgments, decrees, orders and mandates, issue

> such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

The purpose of the instant motion is to remedy the injustice done to Partington by the wrongful adjudication of ineffectiveness against him in No. 10041 and to stop the harassment of him by Kibe and Norris. The HSCR 13 proceeding against Partington in No. 10041 was an original proceeding in this court and Partington seeks to enforce this court's September 24, 1990, order in that proceeding. The HSCR 2 proceeding now pending was brought by disciplinary counsel at ODC, which is an agency of this court. A writ of prohibition directed to disciplinary counsel must, of necessity, be issued from this court. The proper forum, therefore, lies with this court, which is vested with jurisdiction to hear this matter.

II. THE *SUA SPONTE* ADJUDICATION OF INEFFECTIVENESS MADE AGAINST PARTINGTON IN NO. 10041 WAS UNCONSTITUTIONAL AND WITHOUT BASIS IN LAW OR FACT IN THE RECORD OF THAT CASE.

A. THERE WAS NO BASIS IN LAW OR FACT IN THE RECORD FOR THE ADJUDICATION OF INEFFECTIVENESS.

In *State v. Clarke*, this court found that Partington had (1) refused to make.an opening statement, (2) refused to cross-examine a critical prosecution witness, namely the

victim's mother, without first receiving discovery, (3) refused to call the victim's mother as Clarke's witness, (4) elicited testimony from two prosecution witnesses that they believed that Clarke was guilty, and (5) refused to make a closing argument (R[1] 286-89). Without being privy to discovery or attorney-client communications and without *any* accusation of ineffective assistance of counsel by the client himself, this court held that any one of these five acts or omissions (hereinafter, "the five tactical decisions"), standing alone, mandated reversal of Clarke's conviction as plain error on the ground – raised *sua sponte* by this court – that Clarke had been denied effective assistance of counsel. Despite this court's holding, none of the five tactical decisions constitutes ineffective assistance of counsel per se, for the following reasons.

1. The decision not to make an opening statement.

As a matter of law, deciding "whether to make an opening statement to the jury is particularly within the realm of trial strategy." *Commonwealth v. Tarver*, 253 Pa. Super. 185, 190, 384 A.2d 1292, 1295 (1978); *accord State v. Kraft*, 96 Idaho 901, 904-05, 539 P.2d 254, 257-58 (1979); *Gilliard v. State*, 462 So. 2d 710, 716 (Miss. 1985). Waiver of opening statement has been held to be "trivial," *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233, 137 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971), a "tactical decision," *United States v. Murray*, 751 F.2d 1528, 1535 (9th Cir.), *cert. denied sub nom. Moore v. United States*, 474 U.S. 979 (1985),

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[1] Record in No. 10041. All record and transcript references in this memorandum are to the record in No. 10041.

and "a simple matter of trial strategy." *United States v. Salovitz*, 701 F.2d 17, 20 (2d Cir. 1983). A defense attorney may waive opening statement as a matter of routine trial strategy. *Crisp v. State*, 271 Ind. 534, 536, 394 N.E.2d 115, 119 (1979); *People v. Pangelina*, 153 Cal. App. 3d 1, 6, 199 Cal. Rptr. 916, 918-19 (1984). Waiver of opening statement is not per se ineffectiveness of counsel. *State v. Renshaw*, 276 Md. 259, 269, 347 A.2d 219, 226 (1975); *People v. Aiken*, 45 N.Y.2d 394, 400, 408 N.Y.S.2d 444, 448, 380 N.E.2d 272, 275-76 (1978); *People v. Huffman*, 71 Cal. App. 3d 63, 139 Cal. Rptr. 264, 270 (1977); *United States v. Robinson*, 502 F.2d 894, 896 (7th Cir. 1974). That an opening statement may be waived is recognized in Hawaii. *State v. Gutierrez*, 1 Haw. App. 268, 271, 618 P.2d 315, 317 (1980).

During the HSCR 13 proceeding, one of the expert witnesses, Federal Public Defender Michael Levine, testified on this matter, as follows:

> Q (By the HSCR 13 special prosecutor) Do you think it was potentially harmful to [Clarke's] case [for Partington] not to have made an opening statement?
>
> A (By Mr. Levine) Could have been.
>
> Q Given –
>
> A It's just impossible to know.
>
> Q Why? Given what was in the record where Mr. Partington – the day after he chose not to give an opening statement [, he] said he wanted to and in the middle of the trial he told the Court what he would have said in his opening statement.

> What else do you need to know to make a decision as to whether, Mr. Partington should have made an opening statement or not?
>
> A Well, I need to know what his philosophy of his opening statement is, what changed his mind, why did he change his mind at various points, what conversations did he have with his client. And with respect to – for all I know his client was telling him what to do. And we're supposed to be independent of our clients in many respects but sometimes when a guy's looking at life in prison without parole, you listen to your client.

7/9/90 Tr 191:17-192:12; *accord id.* 110:18-25 (statement of expert witness Philip Lowenthal that whether the decision not to make an opening statement was ineffective depends on "knowing the evidence in the case, knowing what was going on between counsel and his client and what the strategic reasons were for deciding whether or not to make the opening statement").

Based on the foregoing testimony and the record in this case, it is evident that Partington gave an opening statement, albeit not at the traditional time nor in the traditional manner, and, further, that *no* competent observer, reviewing the situation without benefit of the underlying attorney-client communications or the thinking of the attorney, could properly conclude that Partington's decision not to make a traditional opening statement constituted ineffective assistance of counsel. From the cases cited above, it is evident that even total waiver of an opening statement may be trivial and is simply a matter of trial strategy. In fact, as noted, the

opening statement may be routinely waived by an attorney. Consequently, in this case, where discovery had not yet been received and much presumably remained unknown about the prosecutor's case (including a critical witness for the prosecution), it may have been wise to waive any opening statement. It was certainly not *in*effective, and, as a matter of law as will be shown, the decision is strongly presumed to have been effective.

2. The decision not to cross-examine a prosecution witness when discovery had not yet been made available.

The apparent reason for the decision not to cross-examine the victim's mother involved prosecutorial misconduct and was based on the following facts that can be found in the trial record in *State v. Clarke:* Partington's pretrial request for discovery of certain family court records had initially been denied – before the trial began.[2] The family court judge reversed himself upon Partington's motion (during trial) for reconsideration, but the decision as to which records to release was still pending. The prosecutor (on a Wednesday) misrepresented to the

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[2] Kibe and Norris's failure to properly investigate this case prior to filing the petition is no better illustrated than in paragraph C of the petition which, in effect, alleges that Partington failed to make a certain pretrial discovery motion in *State v. Clarke.* As was thoroughly explored in the HSCR 13 proceeding the trial record is clear that Partington had, in fact, made the motion before trial. Kibe and Norris have known this fact since long before they initiated the HSCR 2 proceeding.

family court that the victim's mother would not be subject to cross-examination until the following week. In fact, however, the prosecutor called the mother to the stand the very next day (Thursday) over Clarke's objection. On the following day (Friday), the trial judge insisted Partington conduct his cross-examination immediately, even though the discovery was not yet available, and despite the prosecutorial misconduct that had delayed release of the discovery. The trial judge denied subsequent defense motions to have the mother recalled for cross-examination. In *State v. Clarke* on appeal, Clarke's statement of the case in his opening brief was accepted by the prosecutor (R 241). Under appellate rules,[3] the prosecutor thereby implicitly admitted prosecutorial misconduct not only as to this sequence of events but also as to the denial of other discovery, including an alleged admission by Clarke and a prosecution witness's statement (*see* R 114).

The refusal to cross-examine the victim's mother was the only proper course of action when the prosecutor called her before the necessary discovery was available to the defense. Attorneys must conduct careful investigations and inquiries in order to make "informed decisions" on behalf of the client. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *State v. Kahalewai*, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972); *United States v. Moore*, 180 U.S.App.D.C. 227, 230, 554 F.2d 1086, 1089 (1976). Further, cross-examination may be reserved, and a court's refusal to permit a defendant to reserve cross-examination has been held to

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[3] Omission of a counterstatement of a section is permitted if appellee is "satisfied with the section included in the appellant's brief." HRAP 28(c).

be reversible error. *Craig v. State*, 594 S.W.2d 91 (Tex. Crim. App. 1980). Declining to cross-examine a witness may be "a reasonable tactical decision," *United States v. Murray*, 751 F.2d at 1535, and "in some circumstances, the best cross-examination is no cross-examination." *United States v. Calabria*, 614 F. Supp. 187, 193 (E.D. Pa. 1985).

During the HSCR 13 proceeding, one of the expert witnesses, prominent defense attorney Michael Weight, testified on this point, as follows:

> Q (By the HSCR 13 special prosecutor) . . . What's your understanding of what happened?
>
> A (By Mr. Weight) . . . The prosecutor sandbagged the defense in this case by deciding to call the witness the very next day, completely contrary to what they had said to Judge Town [the family court judge] previous. Judge Spencer [the trial judge] permitted that to occur. He then declined to permit counsel to postpone cross-examination until he had access and had read the Family Court records. And after Mr. Partington had in fact read the Family Court records, he was precluded from cross-examination.
>
> Q Well, the Judge said to Mr. Partington, did he not, "You can go ahead and start now. After you've got the records maybe I'll let you restart later and you can call direct again, as your own witness later"?
>
> A I do recall the Judge saying that, and that was entirely improper.

> Q You're certain that was the type of abuse of discretion that would have resulted in any reversal of a conviction?
>
> A They set Mr. Partington up. If he had jumped to the bait, it would set him up probably for an argument by Mr. Clarke at some future time that he was ineffective by jumping to the bait. He could have then, by initiating cross-examination, set himself up for God knows what when those records were revealed to him.

7/9/90 Tr 270:24-272:10.

Thus, as a practical matter, by refusing to conduct cross-examination prematurely, Partington avoided being "sandbagged" by the prosecutor. At the same time, Partington left open the possibility that the trial court would correct its own error and permit cross-examination after the defense received the forthcoming discovery. As a legal matter, Clarke was entitled to reserve cross-examination until the defense received the discovery necessary to be sufficiently informed to conduct a competent cross-examination (or to make an informed decision not to cross-examine), particularly when the defense request for discovery was timely, and more particularly when the prosecutor's unethical conduct delayed the receipt of discovery at the critical juncture. The family court judge who had denied the pre-trial motion for discovery on the merits later admitted he had erred and reversed his own decision (R 1249 (citing 5/18/84 Tr 43-47)). Considering the misconduct of the prosecutor, the error of the trial judge, and the admitted error of the family court judge, the only person who acted properly was Partington.

3. The decision not to call the same prosecution witness.

As noted previously, the trial judge had insisted that cross-examination of the victim's mother take place immediately at the end of direct examination. Subsequent motions to have her recalled were denied. After the prosecution rested, Clarke renewed his motion to recall the mother and his motion for mistrial. The trial judge denied both motions and said the defense would have to call the mother as its own witness and "proceed with her in that fashion" (5/22/84 Tr 135:20-140:14). Partington declined to call her as a defense witness.

A trial lawyer has no duty to call any particular witness because a defendant in a criminal case has no burden or duty to call any witnesses. *United States v. Turchich*, 451 F.2d 333, 359 (8th Cir. 1971); *United States v. Ivey*, 546 F.2d 139, 144 (5th Cir. 1977); *see* 1 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 11.14 (3d ed. 1977). A defendant may rely on failure of proof by the government. *State v. Cuevas*, 53 Haw. 110, 113-14, 488 P.2d 322, 324 (1971); HAWJIC 2.4 (1969); CALJIC 2.61 (5th ed. 1988). The right to call witnesses is independent of the right to confront and cross-examine government witnesses, for these rights are separately identified within the Sixth Amendment to the United States Constitution and, likewise, within article I, § 14 of the Hawaii Constitution.

The failure to call any witnesses at all may be "a reasonable tactical decision[.]" *United States v. Murray*, 751 F.2d at 1535. Given that a criminal defendant has no duty to call any witnesses, a defendant and his lawyer

have the right to decide not to call a particular witness, as in Clarke's trial.

During the HSCR 13 proceeding, prominent defense attorney Michael Weight again testified:

> Q (By the HSCR 13 special prosecutor) And Mr. Partington at that point said, "I've got the records. I now want to cross-examine the witness" and the Judge says, "No, but I'll let you call her as your own witness."
>
> A (By Mr. Weight) That was improper.
>
> Q Was there anything in the records to indicate whether the Judge would have let Mr. Partington ask leading questions?
>
> A It doesn't matter. That's not relevant.
>
> Q Why not?
>
> A Because first of all he has no obligation to call any witness. Any witness he does call, they're vouching for their credibility, particularly where you're set up by having to call a witness who is obviously hostile and the State's witness.
>
> Q Where does it say that, vouching for someone's credibility?
>
> A I'm sorry?
>
> Q Vouching for someone's credibility?
>
> A Certainly. The argument would most certainly be raised by the government had this witness been called by Mr. Partington. "Ladies and gentlemen, you heard what Debra Lynn Arcala testified to and Mr. Partington called her as his witness and Mr. Clarke – remember she

was testifying on his behalf and she said all those terrible things about Clarke." Absolutely.

Q You don't think that's an improper argument?

A I think it would have flown in that court.

7/9/90 Tr 272:24-274:1.

Federal Public Defender Michael Levine testified on the same issue:

Q (By Mr. Partington) Mr. Levine, if someone is denied by a court ruling the opportunity to cross-examine a witness, does a defense counsel run a risk of curing that error if he should call the witness as his own?

A (By Mr. Levine) Yes.

Q And would it be a legitimate trial tactic to preserve that error in the case?

A Yes.

Q And is that an appropriate kind of tactical decision a lawyer makes in a case?

A Yes.

7/9/90 Tr 216:21-217:6.

Thus, if Clarke had called the mother as his own witness, he risked being sandbagged by the prosecution (as explained by Mr. Weight) and would have incurred the considerable risk of curing the error and losing probable reversible error on appeal (as explained by Mr. Levine). Preserving error is a legitimate tactic. *Ratner v. Young,* 465 F. Supp. 386 (D.V.I. 1979). The *Ratner* court said:

> All competent defense lawyers in criminal cases try to get reversible error in the record. It is generally accepted that there is nothing wrong in such efforts as long as they are not corrupt.

465 F.Supp. at 395. The defense in a criminal case is under no obligation to assist the prosecution in having its evidence admitted or to undo the effect of an earlier erroneous ruling to which a proper objection has been made. *United States v. Miller,* 884 F.2d 1149, 1151 (9th Cir. 1989); *United States v. Hashimoto,* 878 F.2d 1126, 1134-1135 (9th Cir. 1989); *United States v. Heinel,* 9 U.S.C.M.A. 259, 262, 26 C.M.R. 39, 42 (1958). If the preservation of such an error involves a trade-off of potential risks and benefits, then a tactical decision is involved. In that case, defense counsel may make the decision independently, *see People v. Aiken,* 45 N.Y.2d 394, 399, 408 N.Y.S.2d 444, 447-48, 380 N.E.2d 272, 275 (1978), even without the consent of the defendant. *State v. DeGuzman,* 68 Haw. 14, 17, 701 P.2d 1287, 1291 (1985). In *Strickland v. Washington,* 466 U.S. 668 (1984), the Court emphasized that informed strategic choices are "virtually unchallengeable," *id.* at 690, noting that courts must apply "a heavy measure of deference to counsel's judgments." *Id.* at 691. In the instant case, the decision not to call the victim's mother as Clarke's witness involved precisely that kind of independent judgment.

4. The decision to elicit witnesses' testimony that they believed the defendant was guilty.

Partington elicited testimony from certain prosecution witnesses that they believed Clarke was guilty. Eliciting such testimony is a perfectly legitimate tactic. The

right to show bias of a witness is well established. *State v. Murphy*, 59 Haw. 1, 17, 575 P.2d 448, 459 (1978); Rule 609.1, Haw. R. Evid. It is reversible error to deny the defense the opportunity to show that a witness wants the defendant to be convicted in a criminal case. *Lanham v. State*, 99 Tex. Crim. 410, 412, 269 S.W. 799, 800 (1925); *State v. Adams*, 14 La. Ann. 620 (1859). It may be noted that the principle is so well settled that a diligent search covering reported decisions in all jurisdictions in the United States turned up nothing other than the two cases cited – one written sixty-seven years ago, and the other 133 years ago.

The kind of impeachment at issue here has, therefore, long since been established as perfectly legitimate. The use of such a tactic does not constitute ineffective assistance of counsel.

5. The decision not to make a closing argument.

Partington refused to make a closing argument other than to say: "Your Honor, in view of there having been no cross-examination of [the victim's mother], my client and I feel closing argument would be a waste of time." (R 113; 5/24/84 Tr 57:25-58:2; also R 1226.) That Clarke participated in the decision to make this brief closing statement in lieu of closing argument is reflected in two ways: in the words just quoted ("my client and I feel . . . "), and in the letter he wrote to the administrative judge shortly after being sentenced (speaking of the decision "I made" in "agreeing with my lawyer" (R 45)).

Closing argument may be waived as a trial tactic. *State v. Renshaw*, 276 Md. 259, 269, 347 A.2d 219, 226-27 (1975); *People v. McMullen*, 82 Ill. App. 3rd 1042, 1049-50, 38 Ill. Dec. 308, 313, 403 N.E.2d 539, 544 (1980); *State v. Chee*, 140 Ariz. 171, 173, 680 P.2d 1232, 1234 (1984); *People v. Diggs*, 177 Cal. App. 3d 958, 970, 223 Cal. Rptr. 361, 368 (1986); *People v. Gaines*, 58 Cal. 2d 630, 635, 25 Cal. Rptr. 448, 450, 375 P.2d 296, 298 (1962).

At the HSCR 13 hearing, one of the expert witnesses (Michael Weight) was questioned on this issue, as follows:

> Q (By the HSCR 13 special prosecutor) . . . [W]hat's your opinion [on whether it was ineffective not to give a closing argument in this case?]
>
> A (By Mr. Weight) It was not ineffective.
>
> Q Why?
>
> A Because the structure of the case, as I understand it, and the way that the case was presented by the government and by the Court could very well have dictated that the only closing statement that could have any effect whatsoever on the jury was precisely what Earle gave.
>
> Q Why?
>
> A Why?
>
> Q Yes.
>
> A Basically because Clarke was convicted by an overzealous prosecutor, unscrupulous in his tactics, compounded by the court.

Q What were the unscrupulous tactics.

A [After summarizing the misconduct described above, Mr. Weight continued:] And therefore in the eyes of the jury and Earle sensed that the jury was truly incensed by this and realized that this was basically a super railroad. It may well be that they would have been willing to acquit without him making the type of formal argument that we perceive a formal final argument to be.

* * *

Q And you don't believe there were effective arguments Mr. Partington could have made in closing argument?

A I'm not prepared to say that any arguments that he could have made would have been more effective than what he did in this case.

Q You think that there were evidentiary points that could have been highlighted to the jury that his client was only guilty of manslaughter and that the government's witness was lying?

A There were evidentiary points that could be made. The tactical decision whether to make them or not was not one for me to second-guess at this point on the state of the evidence.

7/9/90 Tr 282:19-284:23.

Another expert witness (Philip Lowenthal) testified on the same issue, as follows:

Q (By the HSCR 13 special prosecutor) Isn't it best left for final argument to bring home to the jury the significance of the question [of bias] if it wasn't made self-evident during the examination itself?

> A (By Mr. Lowenthal) Again, it's a trade-off. Normally if you're going to give a final argument you'd want to raise that and say "Look how biased they were. They think he's guilty already." But, again, you're making a trade-off, right? If you decide not to give a final argument, you're obviously trading off all the points you would have made had you stood up and said that. And the trade off is, I think I can be more dramatic and I think it's more effective. You get the agreement of your client, talk about it and you do what you're going to do.

7/9/90 Tr 144:12-24.

The record is clear that in Partington's and Clarke's view the case called for something other than a traditional closing argument. As the expert witnesses pointed out, it was a tactical decision, with trade-offs to consider, and Partington's closing statement may have been more effective than a full-blown, traditional argument. There is nothing unethical in telling the jury that the defendant thinks that a closing argument would be a waste of time; no authority to the contrary has ever been cited. In *United States v. Weaver*, 882 F.2d 1128, 1140 (7th Cir.), *cert. denied sub nom. Schmanke v. United States*, 493 U.S. 968 (1989), the court said:

> Where a defendant, fully informed of the reasonable options before him, agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel. [*United States*] *v. Williams*, 681 F.2d 198, 204 (3d Cir. 1980). . . . To allow that would be to exempt defendants from the consequences of their actions at trial and would

debase the right to effective assistance of counsel enshrined in the sixth amendment.

Here, the record shows that Clarke and Partington discussed the question of closing argument and that Clarke made the final decision. That ends the matter.

B. THE INEFFECTIVENESS ADJUDICATION AGAINST PARTINGTON WAS UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS OF LAW.

1. Due process requires a Matsuo hearing prior to any adjudication of ineffectiveness.

Matsuo v. State, 70 Haw. 573, 778 P.2d 332 (1989), is the only published decision construing HSCR 13. In *Matsuo*, this court explicitly held that, where the record is unclear as to the reasons for counsel's decisions, counsel must be afforded an opportunity to defend himself in a non-disciplinary hearing in the trial court *before* any ineffectiveness determination can be made. *Id.* at 578, 778 P.2d at 335. It would be "unfair" to the attorney, said the court, not to have an opportunity "to explain his side of the story" prior to being subjected to an HSCR 13 proceeding. *Id.* It is self-evident that by the term "unfair" the court meant a denial of due process of law.

In the instant case, none of the five tactics in issue is ineffective per se and the record is void as to the reasons for deciding upon the tactics. The case thus meets the criteria mandating a *Matsuo* hearing (i.e., in the trial court) prior to any adjudication of ineffectiveness. This court's *sua sponte* adjudication of ineffectiveness against Partington, which was made without a *Matsuo* hearing,

was unfair for the reasons stated in *Matsuo*. In short, Partington was denied due process of law. And, in the HSCR 2 proceeding presently pending against Partington, the same unfairness continues because he has yet to receive the benefit of a *Matsuo* hearing.

2. The ineffectiveness adjudication against Partington is res judicata in the HSCR 2 proceeding in violation of due process of law.

The ineffectiveness adjudication against Partington in No. 10041 is res judicata and has been since December 27, 1985. At the end of the HSCR 13 proceeding in September 24, 1990, this court held:

> [T]he issue of whether Respondent Partington rendered ineffective assistance of counsel- . . . received *final adjudication* by this court in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985) (mem.), and *could not be relitigated* under a Rule 13 proceeding.

Order in No. 10041 (Sept. 24, 1990) (emphasis added). On October 4, 1990, the HSCR 13 special prosecutor asked this court for reconsideration in two aspects: first, that the order should be changed because of the lack of de novo review, otherwise Partington would have been denied due process, and, second, that this court should provide guidance for "most respondents" in future HSCR 13 proceedings. On October 11, 1990, this court issued a second order, stating:

> Upon consideration of the Rule 13 Prosecutor's Motion for Reconsideration and for Clarification, this court *reaffirms* that the Rule 13

> Special Master does not have the power to reopen the *final judicial determination* that a defendant received ineffective assistance of counsel. . . . The finding of ineffective assistance [is] itself *conclusive*. . . .

Order in No. 10041 (Oct. 11, 1990) (emphasis added) (the remainder of the order providing the "guidance" requested by the special prosecutor for future HSCR 13 proceedings).

Norris, in her letter to Partington of October 19, 1990 (Exhibit 7, attached hereto), clearly recognized the res judicata effect of this court's December 1985 adjudication against Partington, for in her letter Norris stated:

> [G]iven the Hawaii Supreme Court's final adjudication that your conduct in *State v. Clarke* constituted ineffective assistance of counsel, this office's investigation is limited to a determination regarding whether all of the circumstances attendant to your conduct supports a finding of a violation of *any* provision of the Hawaii Code of Professional Responsibility.

(Emphasis in original.) Norris is clearly recognizing two critically important points in this case: (1) that any violation of the Hawaii Code of Professional Responsibility by Partington is predicated on his having rendered ineffective assistance of counsel to Clarke, and (2) that the final adjudication that Partington rendered ineffective assistance to Clarke has eliminated the necessity of having to prove this predicate because the final adjudication is res judicata. As noted previously, however, Partington had no opportunity to be heard prior to the adjudication against him, and thus due process of law is denied

because the final adjudication of ineffectiveness is res judicata.

3. The ineffectiveness adjudication absent a prior *Matsuo* hearing causes any subsequent disciplinary proceeding to necessarily violate due process of law.

In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court considered the situation where the tribunal making the final adjudication had also made the probable cause determination to proceed. The Court said:

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. *Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause.* Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.

> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. *Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision a substantial due process question would be raised.*

Withrow, 421 U.S. at 57-58 (emphasis added).

Here, the December 1985 ineffectiveness determination against Partington was not merely a finding of probable cause, but a "final adjudication" of misconduct[4] resulting in the reversal of Clarke's conviction for that very reason. This court expressly held in the HSCR 13 proceeding that the issue of ineffectiveness may not be relitigated. Thus, a finding of "not guilty" in the HSCR 2 proceeding (assuming such a finding is even permitted) would be totally incompatible with the final adjudication reversing Clarke's conviction. By clear implication, *Withrow* stands for the rule that due process is denied where the probable cause determination by court or agency is incompatible with any of the possible ultimate adjudications

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[4] That the ineffectiveness final adjudication was one of misconduct is beyond dispute. Ineffective assistance of counsel arises either from misconduct or incompetence. Partington's vindication in the HSCR 13 proceeding is also res judicata that no incompetence was involved.

by the same court or agency.[5] Under *Withrow*, it is irrelevant whether the "final" adjudication of ineffectiveness against Partington is res judicata in the HSCR 2 proceeding and it is equally irrelevant whether the proceeding will be conducted de novo, for it is the fact of the original adjudication, not its effect, that offends due process.

The instant case is the classic situation discussed in *Withrow*. Considering that neither the hearing committee nor the Disciplinary Board can hear any constitutional claims (as set out *infra*), the only forum in which Partington can raise the issue is this court, the very forum that has already rendered a "final" adjudication on the issue. A clearer violation of due process is hard to imagine. Absent a vacation of the final adjudication of ineffectiveness rendered against Partington in No. 10041, the rule in *Withrow* stands as an *absolute bar* to an HSCR 2 proceeding predicated on his trial conduct in this case.

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[5] Obviously, the concern in *Withrow* is bias on the part of the court making the ultimate adjudication. Note that it is the court as an institution that would be biased in the instant situation, and not merely some particular justices. The fact that justices different from those who made the original adjudication might make the ultimate adjudication is irrelevant. *See Lowe v. City of Eugene*, 254 Or. 518, 537, 451 P.2d 117, 459 P.2d 222, 223, 463 P.2d 360 (1969), *cert. denied*, 397 U.S. 1042 (1970) (a court "makes decisions *as a court*, not as a collection of individual justices") (emphasis added).

C. ANY ISSUE OF INEFFECTIVENESS MUST FIRST BE DECIDED BY THE TRIAL COURT AFTER REMAND FOR A *MATSUO* HEARING BECAUSE THAT ISSUE MAY NOT BE RAISED IN THE FIRST INSTANCE ON APPEAL.

Many courts have discussed whether a criminal defendant may assert ineffective assistance of counsel for the first time on appeal. Setting out the general rule, the Ninth Circuit has stated that "normally such a claim cannot be advanced without the development of facts outside the original record." *United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978). In extreme cases, however, "the failure of the trial court to take note sua sponte of the problem might constitute plain error which may be considered on direct appeal." *United States v. Porter*, 431 F.2d 7, 11 (9th Cir. 1979). The Fifth Circuit has held that "claims of inadequate representation cannot be determined on direct appeal where such claims were not raised before the District Court and there has been no opportunity to develop and include in the record evidence bearing on the merits of the allegations." *United States v. Rodriguez*, 582 F.2d 1015, 1016 (5th Cir. 1978) (per curiam). The California Supreme Court has explained the problem as follows:

> In some cases, . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal, [for] [o]therwise, appellate courts would become engaged "in the perilous process of second-guessing."

People v. Pope, 23 Cal. 3d 412, 426, 152 Cal. Rptr. 732, 740, 590 P.2d 859, 867 (1979) (citations omitted). The Kansas Supreme Court has said: "Except in the most unusual cases, to assert a claim of ineffective assistance of counsel without any independent inquiry and investigation apart from reading the record is questionable to say the least." *State v. Van Cleave*, 239 Kan. 117, 120-21, 716 P.2d 580, 583 (1986).

The rule in this country as to whether a criminal defendant may raise the issue of ineffective assistance of counsel for the first time on appeal is either that the issue may not be raised or that it may only be raised in extraordinary circumstances (not applicable here) – where the evidence of ineffectiveness in the appellate record is irrefutable. *E.g., United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989); *United States v. Barham*, 666 F.2d 521 (11th Cir.), *cert. denied*, 456 U.S. 947 (1982); *Dossey v. State*, 489 So. 2d 662 (Ala. Crim. App. 1986); *Barry v. State*, 675 P.2d 1292 (Alaska App. 1984); *Rogers v. State*, 289 Ark. 257, 711 S.W.2d 461 (1986); *Morse v. People*, 168 Colo. 494, 452 P.2d 3 (1969); *Wright v. State*, 513 A.2d 1310 (Del. 1986); *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987); *Crump v. State*, 183 Ga. App. 43, 357 S.E.2d 863 (1987); *State v. Whitsel*, 339 N.W.2d 149 (Iowa 1983); *White v. Commonwealth*, 695 S.W.2d 438 (Ky. App. 1985); *State v. Fontenot*, 368 So. 2d 121 (La. 1979); *Jackson v. State*, 52 Md. App. 327, 449 A.2d 438 (1982); *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987); *State v. Walker*, 80 N.J. 187, 403 A.2d 1 (1979); *State v. Slapnicka*, 376 N.W.2d 33 (N.D. 1985); *Commonwealth v. Westcott*, 523 A.2d 1140 (Pa. Super. 1987); *State v. Felder*, 351 S.E.2d 852 (S.C. 1986); *State v. Aliberti*, 401 N.W.2d 729 (S.D. 1987); *In re Mecier*, 143 Vt. 23, 460 A.2d 472 (1983).

Therefore, even if Clarke had raised the issue of ineffectiveness in No. 10041, the above-cited cases from twenty different jurisdictions show that this court's action in considering the issue for the first time on appeal was improper. All the problems that have arisen out of this court's precipitous and unjustified adjudication based on a wholly inadequate record could have been avoided if the rule recognized by every jurisdiction to have squarely addressed the question had been followed by this court.

D. THE INEFFECTIVENESS ADJUDICATION MUST BE VACATED.

Because the *sua sponte* adjudication had no basis in law or fact, and because it was made in violation of due process of law in that Partington was denied a *Matsuo* hearing, the adjudication itself must be vacated.

III. PROHIBITION IS THE APPROPRIATE REMEDY AGAINST KIBE AND NORRIS.

A. THE LAW

Prohibition is an extraordinary remedy which requires special circumstances for the writ to be granted. *Wolfe v. Au*, 67 Haw. 259, 262-63, 686 P.2d 16, 20 (1984); *Honolulu Advertiser, Inc. v. Takao*, 59 Haw. 237, 241, 580 P.2d 58, 62 (1978). Prohibition is intended as a corrective remedy to prevent the commission of a future act. *McCaw v. Moore*, 39 Haw. 157, 160 (1951).

In determining whether special circumstances exist justifying the extraordinary remedy of prohibition, this court has looked for the following preconditions: (1) a clear and indisputable right of the petitioner to relief and (2) a lack of other means to adequately redress the wrong or to obtain the requested relief. *State v. Oshiro*, 69 Haw. 438-41, 746 P.2d 568-70 (1987); *see Arnold v. Higa*, 61 Haw. 203, 206, 600 P.2d 1383, 1385 (1979); *Nakagawa v. Heen*, 58 Haw. 316, 318, 568 P.2d 508, 511 (1977); *Chung v. Ogata*, 54 Haw. 146, 150-51, 504 P.2d 868, 870 (1972). This court has also said that prohibition is intended for cases of usurpation or abuse of power. *Kaelemakule v. Kaelemakule*, 33 Haw. 725, 730 (1936).

Partington seeks to have this court prohibit Kibe and Norris from acting illegally and abusing their power. More specifically, Partington seeks to prohibit them from utilizing as evidence in the pending HSCR 2 proceeding against him (1) the December 27, 1985, *sua sponte* adjudication of ineffectiveness made against him and/or (2) the HSCR 13 special master's July 31, 1990, decision and order, which was declared a nullity by this court in its September 24, 1990, order dismissing the HSCR 13 proceeding. Partington further seeks to prohibit Kibe and Norris from asserting Defendant Clarke's constitutional rights to counsel over Clarke's objections, because Kibe and Norris have no standing to assert Clarke's rights.

B. PARTINGTON HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF.

The right to counsel is fundamental and has been referred to as perhaps the most important in constitutional

law. *Powell v. Alabama*, 287 U.S. 45, 70 (1932). A defendant's right to counsel necessarily includes a corresponding right of a criminal defense attorney to practice his profession without unreasonable hindrance; otherwise, the defendant's right to counsel would be meaningless. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court said:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. * * * No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.* * * *
>
> *Judicial scrutiny of counsel's performance must be highly deferential.* It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, *a court must indulge a strong presumption*

> *that counsel's conduct falls within the wide range of reasonable professional assistance;* that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *There are countless ways to provide effective assistance in any given case.* Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 688-89 (emphasis added) (citations omitted). Thus, the Court recognizes the "constitutionally based independence of counsel" and the "strong presumption" of effectiveness. It is appropriate to examine the bases of these two aspects of the fundamental right to counsel.

The strong presumption of effectiveness protects the defense attorney and the judicial system from groundless post-conviction claims of ineffectiveness. The presumption works against a criminal defendant who is making a claim of ineffectiveness for, as one court has held, "it requires strong and convincing proof to overcome this presumption." *Crisp v. State*, 271 Ind. 534, 536, 394 N.E.2d 115, 119 (1979). At the same time, however, the presumption works in favor of defendants as a class because, without it, a defendant's attorney would be constrained, for example, from utilizing an unorthodox defense strategy which is in the defendant's best interest. For these reasons, the right to the presumption of effectiveness is not the particular defendant's right but rather is the right

of the attorney, who asserts it on his own behalf and thereby on behalf of defendants generally.[6]

The "constitutionally protected independence of counsel" protects both the criminal defendant and the defense attorney from unreasonable interference in their choice of trial strategies and tactics. The *Strickland* Court, which spoke of the "decisions" and "performance" of the defense attorney as being constitutionally protected, 466 U.S. at 688, saw this right as vested in the attorney. When a criminal defendant brings an ineffectiveness claim against the attorney (as in *Strickland*), the right of independence of counsel will be asserted by the attorney, or the state, not the criminal defendant. The right, therefore, is ultimately vested in the attorney and, through the attorney's assertion of the right, it serves to protect criminal defendants generally.

Here, defendant Clarke has never complained against Partington and refuses to complain against him. As previously set out, the five tactics at issue are all legitimate tactics. Moreover, so long as a tactic is legitimate, its appropriateness is a decision vested solely in the attorney and/or the client. This policy is manifested in the constitutionally protected independence of counsel and the strong presumption of effectiveness.

Without knowing why any of the five tactics were chosen, Kibe and Norris predicated the HSCR 2 petition against Partington on the fact that these tactics were employed. In fact, Kibe and Norris do not know, and will

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[6] In fact, the presumption of effectiveness is typically invoked by the state against the criminal defendant who is claiming to have received ineffective assistance of counsel.

never know, why the tactics were chosen, for Partington and Clarke refuse to tell them. *See* note 9, *infra*. Thus, as a matter of constitutional law, Kibe and Norris will never be able to rebut the strong presumption that all five tactics were effective. By application of the presumption to the facts of this case, Partington must prevail, providing, of course, that the proceeding is conducted within constitutional constraints.

Kibe and Norris are obviously aware that they have a "problem" in that they can never rebut the strong presumption of effectiveness. To solve their "problem," Kibe and Norris assert that Partington is not entitled to the presumption of effectiveness (*see* Exhibit 6 attached hereto, at 2), and they would employ a presumption of *in*effectiveness against Partington.

It is recognized, as a matter of constitutional law, that an attorney is not required to endure a specious disciplinary proceeding, when it is patently clear that the attorney must prevail in the end. *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984). It is this *constitutional* right that Partington seeks to vindicate by the instant motion.

C. PARTINGTON LACKS ANY OTHER MEANS TO ADEQUATELY REDRESS THE WRONG OR TO OBTAIN THE REQUESTED RELIEF.

1. The wrong to be remedied here is requiring Partington to defend himself in an attorney disciplinary proceeding which is itself unconstitutional, a wrong for which prohibition is the only remedy.

In *Strickland*, the Supreme Court explained the general limitations placed on post-trial inquiries, as follows:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed

> guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. *Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.*

466 U.S. at 690. To subject counsel to an investigation under these circumstances is, therefore, to engage in the very kind of "intrusive post-trial inquiry" condemned by the United States Supreme Court in *Strickland*, 466 U.S. at 690.

The very existence of the HSCR 2 proceeding against Partington imparts a chilling effect on the right to exercise the "constitutionally protected independence of counsel," *Strickland*, 466 U.S. at 689, by Partington and other members of the defense bar in Hawaii. At the HSCR 13 hearing, one of the expert witnesses, prominent defense attorney Michael Weight, explained the chilling effect on the defense bar of that proceeding against Partington, as follows:

> [The existence of a proceeding like this] has caused me to be very cautious in approaching difficult cases at trial. The more difficult the case, the less likely it is that you are going to be able to successfully apply a traditional defense, and the more likely it is that you're going to

> have to reach out to be creative and take much greater risks if you are going to at all succeed.

7/9/90 Tr 266:16-22. Another expert witness, Federal Public Defender Michael Levine, put it this way:

> And we have to have [lawyers] who are willing to defend the alleged mental criminals, seriously disturbed people. But by God, I'd hate to be the one defending the person. And now for a court to come along and to take a person who is willing to take on the defense of this kind of person who is poor, who's probably the most despised person in our society and to say, without the client ever having said a word, "You're ineffective," to blast your name – yeah, I get very troubled, very troubled indeed. It's almost outrageous. I mean who do they expect are going to take these cases? For what? To get your name blasted in the newspapers?

7/9/90 Tr 173:22-174:8.

The circumstances in *State v. Clarke* were difficult enough: the prosecution made misrepresentations to the family court and improperly withheld discovery from the defendant; the trial judge permitted every unscrupulous tactic by the prosecutors; and the case itself was not easy. These factors served to limit the strategic choices of the defense.

The criminal defense bar in Hawaii is well aware that, even in the difficult kind of situation presented at Clarke's first trial, this court arbitrarily and wrongly labeled certain defense tactics ineffective and that Partington's faithful discharge of his "overarching duty to advocate the defendant's cause," *Strickland*, 466 U.S. at

688, caused him to be subjected to two specious disciplinary proceedings (first under HSCR 13,[7] and now under HSCR 2). The defense bar is equally well aware that those who acted improperly in this affair have not been and are not being subjected to any disciplinary action: not the prosecutors who engaged in misconduct in *State v. Clarke;* not Christopher R. Evans, the defense attorney at Clarke's second trial, who knowingly betrayed Clarke;[8] not Kibe and not Norris, even though both of them can only be acting for improper purposes because they know full well that the proceeding they are bringing against Partington is unconstitutional.

The rule has now been laid down in Hawaii that, even with the client's agreement as to legitimate tactical choices, the attorney and client can no longer decide how to conduct the defense. For the reasons set out above, the very existence of this proceeding – particularly when it was preceded by the unconstitutional HSCR 13 proceeding which eventually had to be dismissed – has had a chilling effect on the constitutionally protected independence of counsel in Hawaii and is itself unconstitutional. Unless this court grants the requested writ of prohibition,

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[7] Although HSCR 13 proceedings are intended to be remedial, the HSCR 13 special master for the proceeding brought against Partington considered it to be *disciplinary. See. e.g.*, "Decision and Order of Special Master" (July 31, 1990) at 6, 29, 30.

[8] *See* Clarke's Motion for Writ of Prohibition filed on this date.

Kibe and Norris will continue to conduct an unconstitutional intrusive post-trial inquiry. Waiting until the proceeding is over and resolved in Partington's favor is no vindication for two reasons: First, the wrong here is requiring Partington to defend himself in a disciplinary proceeding which is itself unconstitutional. Second, Partington must, as a matter of law, prevail in the HSCR 2 proceeding, as previously set out, leaving him without any remedy whatsoever for having been subjected to an unconstitutional proceeding because Kibe and Norris are immune "from suit and liability," under Hawaii law. HSCR 2.8.

2. Kibe and Norris refuse to recognize the necessary implications flowing from this court's orders, and only this court is in a position to enforce its own orders.

Kibe and Norris are conducting the HSCR 2 proceeding against Partington in disregard of three necessary implications flowing from this court's orders in No. 10041. *First*, the September 24, 1990, order nullified the HSCR 13 special master's decision, but Kibe and Norris still intend to use the decision as "evidence" against Partington in the HSCR 2 proceeding. *Second*, the September 24, 1990, order also noted that any ethical violations should be considered pursuant to HSCR 2, but HSCR 2 itself imposes the burden of proof upon ODC, not the burden of *dis*proof upon Partington, as Kibe and Norris would have it. HSCR 2.7(b). This court did not authorize Kibe and Norris to conduct an HSCR 2 proceeding in violation of the rules. *Third*, this court's order of March 7, 1990, permitting the HSCR 2 proceeding to go forward

simultaneously with the HSCR 13 proceeding certainly contemplated separate and distinct proceedings, not an HSCR 2 proceeding that is a blatant attempt to relitigate the HSCR 13 proceeding in order to obtain a different result. Partington is entitled to have these orders enforced against Kibe and Norris, not disregarded by them. This court is the only forum in which Partington can have the orders enforced, and enforcement *at the present time* is the only meaningful remedy for the wrongs Kibe and Norris are committing.

3. The absence of interlocutory review during HSCR 2 proceedings means that prohibition is the only available remedy in this case.

If HSCR 2 provided for an interlocutory review mechanism, the extraordinary remedy of prohibition would not be necessary. However, HSCR 2 fails to afford any right of interlocutory review, as this court has said:

> [N]either the Hearing Committee nor the Disciplinary Board have authority to decide questions of constitutional law, e.g., *HOH Corp. v. Motor Vehicle Industry Licensing Board*, 69 Haw. 135, 736 P.2d 1271 (1987) ("[A]n administrative agency . . . generally lacks power to pass upon the constitutionality of a statute.")

Order of Remand, *Office of Disciplinary Counsel v. Marsland*, No. 15179 (Haw. Mar. 7, 1991). Partington either is entitled to prohibition or is without any remedy whatsoever.

As to the constitutional issues presented in this case, the availability of interlocutory review in attorney disciplinary proceeding is an indicium that due process is being provided. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436-37 (1982). Correspondingly, the lack of interlocutory review raises a serious constitutional question.

D. KIBE AND NORRIS ARE ABUSING THEIR POWER AND ARE USURPING CLARKE'S CONSTITUTIONAL RIGHTS.

1. Kibe and Norris have no intention of conducting a de novo hearing on the ineffectiveness issue, as required by due process of law.

As previously set out, it is clear that *any* disciplinary proceeding predicated on Partington's conduct in *State v. Clarke* would have to be de novo on the issue of ineffective assistance in order to begin to meet the requirements of due process. The term "de novo" has a well-recognized and definite meaning in the law, as follows:

> The very word de novo itself means anew, afresh; trying anew the matters involved in the original hearing as if there had not been heard before and *as if no decision had been previously entered.*

Rudolph v. State, 238 So. 2d 542, 453 (Ala. 1970) (emphasis added); *accord People v. Bourdon*, 10 Cal. App. 3d 878, 881, 89 Cal. Rptr. 415, 417 (1970); *In re Poole*, 136 Vt. 242, 245, 388 A.2d 422, 424 (1978); *Southern Canal Co. v. State Board of Water Engineers*, 159 Tex. 227, 231, 318 S.W.2d 619, 622 (1958).

Norris unequivocally told the hearing committee that the HSCR 2 proceeding against Partington will be conducted de novo on the issue whether he rendered ineffective assistance to Clarke. Essene affidavit attached hereto, para. 2. Norris's statement, however, is a deliberate misrepresentation intended to create the false appearance that the proceeding will be constitutionally conducted. That Kibe and Norris well know the falsity of her representation is manifest from three documents in the record drafted by Norris.

First, in the HSCR 2 petition, Kibe and Norris pleaded the ineffectiveness adjudication against Partington (as well as the entire history of the HSCR 13 proceeding). Exhibit 1 attached hereto, at 5-8, paragraphs N-W. By pleading the adjudication, Kibe and Norris intend to prove it. Second, the exhibit list prepared by Kibe and Norris for the HSCR 2 proceeding states that the adjudication, as well as the special master's decision, will be offered as "evidence" that Partington rendered ineffective assistance of counsel. Exhibit 3 attached hereto (designated as Exs. C-1 and G therein). Third, as mentioned previously, Norris stated that the December 1985 finding of ineffectiveness was a "final adjudication" of the issue. Exhibit 7 attached hereto. By definition, a *final* adjudication is not subject to de novo review. For these three reasons, it is clear that Kibe and Norris have no intention of conducting the HSCR 2 proceeding "as if no decision had been previously entered."

What is reprehensible about the conduct of Kibe and Norris is that they are trying to cover up their illegal actions by (a) the misrepresentation about the proceeding being de novo and (b) the preparation of a witness list

(Exhibit 4 attached hereto) with the names of four apparent experts[9] who are expected to assess Partington's trial conduct in *State v. Clarke*. Their witness list gives the appearance that Kibe and Norris are, in fact, going to conduct a de novo hearing on the issue of whether Partington rendered ineffective assistance of counsel. As shown in the attached affidavits, however, none of these four witnesses has ever seen the record in *State v. Clarke* or has any idea how each might testify. Kibe and Norris surely have no intention of using "witnesses" whose testimony is completely unknown. Their witness list must be a sham, intended only to deceive.

To make matters worse, no expert can ever evaluate Partington's conduct based solely on the record because, as Kibe and Norris know full well, Partington and Clarke refuse to reveal their attorney-client communications. As the Court stated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a

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[9] Those experts are Circuit Judge Marie N. Milks, University of Hawaii Law Professor Addison N. Bowman, State Public Defender Richard W. Pollack, and Federal Public Defender Richard Ney (successor to Michael Levine).

> proper assessment of counsel's other litigation decisions.

466 U.S. at 691. The listing of witnesses who will never be in a position to testify knowledgeably shows the appalling bad faith on the part of Kibe and Norris.

In an attempt to bolster her misrepresentation that Partington will be afforded a de novo hearing, Norris claims that Partington will be afforded "a full opportunity to explain [his conduct]." Exhibit 8 attached hereto. However, HSCR 2.7(b) imposes a clear and convincing burden of proof upon ODC, not upon the respondent attorney. Kibe and Norris are not free to disregard their burden of proof by invoking an unconstitutional presumption of *in*effectiveness that shifts the burden to Partington – a burden they know he cannot possibly meet because Clarke has silenced him by invoking the attorney-client privilege. Finally, to call the adjudication of ineffectiveness against Partington "evidence" is ludicrous. If the adjudication is admissible against him, there is no explanation possible by Partington to overcome the weight which of necessity would be given to the adjudication. Norris's pretense here is further proof of her bad faith.

The fact that Kibe and Norris do not intend to conduct a de novo hearing is also shown by the fact that the HSCR 2 petition (Exhibit 1 attached hereto) fails to allege how and why Partington's trial conduct in *State v. Clarke* violated any provision of the Code of Professional Responsibility.[10] The petition fails to allege any *specific*

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[10] In fact, Norris and Kibe have no idea whether Partington's conduct violated the Code because they do not know

(Continued on following page)

error by Partington.[11] The reason for this is obvious: Kibe and Norris have no competent evidence of any violations.

It is clear from the above that Kibe and Norris are abusing the power of their offices. Perhaps the most telling admission by Norris that she and Kibe are abusing this power is found in her extraordinary claim that "this office is not required to be bound by any court's decision or any other proceeding." Exhibit 8 attached hereto, at 2. Norris' absurd claim that ODC is above the law is the height of arrogance, yet Kibe and Norris continue to conduct themselves in the HSCR 2 proceeding as if her claim were true. Norris's [sic] claim is a classic example of the adage: "Power tends to corrupt and absolute power corrupts absolutely." Lord Acton: letter to Bishop Mandell Crieghton (Apr. 3, 1887), quoted in *The Concise Oxford Dictionary of Quotations* 1 (2d ed. 1981). This abuse of power by Kibe and Norris is the very situation for which prohibition was intended to remedy.

(Continued from previous page)

(1) what the discovery in *State v. Clarke* showed, (2) what the pretrial investigation conducted by Partington showed, and (3) what the substance of the attorney-client communications was between Partington and Clarke. Moreover, Norris and Kibe have no means of obtaining such knowledge because Clarke refuses to cooperate with them despite their effort to induce him to file a complaint against Partington.

[11] A "specific error" is prerequisite to a finding of ineffective assistance. *United States v. Cronic*, 466 U.S. 648, 666 (1984); *Strickland v. Washington*, 466 U.S. 668, 678 (1984); *State v. Antone*, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980).

2. Kibe and Norris are usurping Clarke's constitutional rights to the effective assistance of counsel.

The HSCR 2 petition filed against Partington alleges the following violations of the Hawaii Code of Professional Responsibility:

> 1. *DR 6-101(A)(3)* (prohibiting neglect of a legal matter entrusted to him);
>
> 2. *DR 7-101(A)(1)* (failure to seek the lawful objectives of his client through reasonably available means provided by law);
>
> 3. *DR 7-101(A)(3)* (prejudice or damage to the client during the course of the professional relationship); and
>
> 4. *DR 1-102(A)(5) and (6)* (conduct prejudicial to the administration of justice and conduct adversely reflecting on fitness to practice law, respectively).

Exhibit 1 attached hereto, at 10-11, paragraph DD.

The first three alleged violations of the Code, which amount to a claim that Partington did not effectively represent Clarke, are directly related to Clarke's constitutional rights to the effective assistance of counsel. The fourth alleged violation is possible only if the first three are proved because, without the first three (relating to ineffective representation), there are no allegations of "prejudicial" or "adverse[]" conduct. Clarke has determined, however, that he did receive effective assistance of counsel from Partington, and Clarke reached that determination with the assistance of independent counsel appointed by the circuit court for the express purpose of

advising Clarke on that very issue. In fact, because Clarke is presently represented by two attorneys, he has made the effectiveness determination with the independent assistance of each of those attorneys. Clarke's determination is binding and conclusive on Kibe and Norris because no one other than Clarke has standing to assert his constitutional rights arising out of *State v. Clarke.*

In *Chocallo v. Bureau of Hearings and Appeals,* 548 F. Supp. 1349, 1359 (E.D. Pa. 1982), *aff'd,* 716 F.2d 889 (3d Cir.), *cert. denied,* 464 U.S. 983 (1983), the court said:

> [I]n the course of representing their clients, [the] attorneys are entitled to make a wide range of tactical and legal decisions, and *only the client,* and not a third party such as any administrative law judge, *has standing to complain that these decisions and actions violate the constitutional rights of the client.*

Similarly, in *United States v. Gauthier,* 34 M.J. 595 (A.C.M.R. 1992), the defendant's wife attempted to raise the claim that her husband had been denied his constitutional right to effective assistance of counsel, but the court denied standing to the spouse. Refusing to hear her claim, the court said:

> We hold that there was no error in the post-trial processing of this case. The appellant has never alleged ineffectiveness of his trial defense counsel. In fact, he insisted that his trial defense counsel remain as his counsel. While his wife may believe the appellant's counsel was ineffective, she does not have standing to raise the issue.

34 M.J. at 596. By the same token here, Kibe and Norris have no standing to assert Clarke's constitutional rights. Nor did this court in December 1985.[12]

IV. CONCLUSION

Since the adjudication of ineffectiveness against Partington in December 1985, he has been nearly continuously harassed by agents of this court with attendant damage to his reputation and livelihood. All of this has happened because this court acted in haste and made a mistake. The time has come for this court to undo its mistake in order to remedy the injustice done to Partington. This court should, therefore, grant the relief he is seeking.

DATED: Honolulu, Hawaii, June 16, 1992.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

---

[12] If a court is concerned that a criminal defendant's rights may have been violated but the issue has not been raised, then the court should invite the defendant to raise the issue. If the defendant declines after consultation with counsel, then the court should deem the issue waived. Where an issue involves the conduct of defendant's present counsel, consultation with new counsel will be necessary. The *Matsuo* hearing is intended to deal with such situations.

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 AFFIDAVIT OF EARL A. PARTINGTON

AFFIDAVIT OF EARLE A. PARTINGTON

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

EARLE A. PARTINGTON, being first duly sworn on oath, deposes and says:

1. I am the movant in this matter, and I was the attorney for Defendant Clifford M.M. Clarke, Sr., in his first trial and appeal (No. 10041).

2. All tactics which I employed in Defendant Clarke's first trial were legitimate trial tactics employed for the purpose of furthering Clarke's legitimate rights and interests.

3. At the oral argument in No. 10041 on December 16, 1985, when Associate Justice Frank D. Padgett accused me of having been deliberately ineffective at Clarke's first trial, both Deputy Prosecuting Attorney Emlyn H. Higa,

on behalf of the State of Hawaii, and I, on behalf of Defendant Clarke, denied that there had been any ineffective assistance of counsel on my part in the trial court.

4. Attached hereto as Exhibits 1-8 are true and correct copies (excluding attachments or exhibits thereto) of the following documents from the HSCR 2 investigation and proceeding pending against me arising out of *State v. Clarke*:

HSCR 2 Proceeding (complete file, except Summons)

Exhibit 1: Petition

Exhibit 2: Answer

Exhibit 3: Petitioner's Exhibit List

Exhibit 4: Petitioner's Witness List

Exhibit 5: Prehearing Order

HSCR 2 Investigation

Exhibit 6: Letter dated October 16, 1990, from Assistant Disciplinary Counsel Charlene M. Norris to me.

Exhibit 7: Letter dated October 19, 1990, from Assistant Disciplinary Counsel Charlene M. Norris to me.

Exhibit 8: Letter dated October 31, 1990, from Assistant Disciplinary Counsel Charlene M. Norris to me.

5. On May 6 or 7, 1992, I telephoned the following three persons who appear on "Petitioner's Witness List" (Exhibit 4 above): Richard W. Pollack, The Honorable Marie N. Milks, and Richard Ney.

6. Each of these three "witnesses" informed me that they had no idea what they would say if called as witnesses because none of them has ever seen any of the record in *State v. Clarke* and, without reviewing that record, they have no way of knowing what they would say. All acknowledged that they had had brief telephone contact with Defendant Norris.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Earle A. Partington
EARLE A. PARTINGTON

Subscribed and sworn to before me
this 8th day of June, 1992.

/s/ Cheryl Schepper Lau
Notary Public, State of Hawaii

My commission expires: 12/7/94

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 AFFIDAVIT OF KAREN A. ESSENE

AFFIDAVIT OF KAREN A. ESSENE

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

KAREN A. ESSENE, being first duly sworn on oath, deposes and says:

1. I am an attorney licensed to practice in the State of Hawaii.

2. On April 7, 1992, I attended the scheduling conference in *Office of Disciplinary Counsel v. Partington*. During the course of the conference, Assistant Disciplinary Counsel Charlene M. Norris stated that (a) the 1985 adjudication of ineffective assistance against attorney Earle A. Partington was admissible evidence against him in the HSCR 2 proceeding, (b) she would indeed offer it in the proceeding against him, and (c) the proceeding would nonetheless be conducted "de novo" on the issue of whether he rendered ineffective assistance of counsel to his client Clarke.

3. At Partington's request, I reviewed "Petitioner's Witness List," a copy of which is attached as Exhibit 4.

4. Professor Addison M. Bowman is included as one of the witnesses on Petitioner's Witness List, which states (in paragraph 15) that "Professor Bowman will testify regarding his assessment of Mr. Partington's conduct in *State v. Clarke.*"

5. On May 8, 1992, I telephoned Professor Bowman, and he told me the following:

a. that he received a telephone call from the Office of Disciplinary Counsel regarding the HSCR 2 proceeding against Earle Partington;

b. that he has *not* reviewed the record in *State v. Clarke* or any other materials in the HSCR 2 proceeding; and

c. that he has formed no opinion on any matter in the HSCR 2 proceeding.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Karen A. Essene
KAREN A. ESSENE

Subscribed and sworn to before me
this 6th day of June, 1992.

/s/ Cheryl Schepper Lau
Notary Public, State of Hawaii

My commission expires: 12/7/94

EXHIBIT 1

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL, Petitioner, v. EARLE A. PARTINGTON, Respondent.	CONFIDENTIAL ODC 84-065-1467 DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT RECEIVED 9 July 1991 DAY MONTH YEAR TIME: 8:45 a.m. BY [Illegible]

SUMMONS

You are notified that pursuant to Rule 2.7, Rules of the Supreme Court of Hawaii, and DB 11, Rules of Procedure of the Disciplinary Board of the Hawaii Supreme Court, a Petition for Discipline is hereby served upon you. Within twenty (20) days of the service of this Petition upon you, you must file the original of your Answer to the Petition with the Secretary of the Disciplinary Board and a copy of your Answer with the Office of Disciplinary Counsel. Both the original and a copy of your Answer must be mailed or delivered directly to the Office of Disciplinary Counsel at the address listed below. *In the event you fail to file and serve your Answer within the above-stated twenty (20) days or within any extension granted by the Chairperson of the Disciplinary Board, all allegations contained in the Petition will be deemed admitted.*

DATED: Honolulu, Hawaii, July 8, 1991.

OFFICE OF DISCIPLINARY COUNSEL

B. MARTIN LUNA,
Disciplinary Board
Secretary 1164 Bishop
Street, Ste. 600
Honolulu, Hawaii
96813

/s/ Charlene M. Norris
GERALD H. KIBE
Chief Disciplinary Counsel
CHARLENE M. NORRIS
Assistant Disciplinary
Counsel
1164 Bishop Street,
Suite 600
Honolulu, Hawaii 96813
Telephone: 521-4591

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL, Petitioner, v. EARLE A. PARTINGTON, Respondent.	CONFIDENTIAL ODC 84-065-1467 PETITION

PETITION

The Office of Disciplinary Counsel of the Hawaii Supreme Court ("Petitioner"), by and through its chief Disciplinary Counsel, Gerald H. Kibe, and its Assistant

Disciplinary Counsel, Charlene M. Norris, advises the Disciplinary Board of the Hawaii Supreme Court that formal disciplinary proceedings are hereby instituted against EARLE A. PARTINGTON, Esq. ("Respondent").

Petitioner is a duly organized office existing under Rule 2, Rules of the Supreme Court of Hawaii, and DB 11(a), Rules of Procedure of the Disciplinary Board of the Hawaii Supreme Court, and its address is 1164 Bishop Street, Suite 600, Honolulu, Hawaii 96813.

Respondent was duly admitted to the practice of law in the State of Hawaii on May 1, 1975. Since being admitted to the Bar of the Supreme Court of Hawaii, Respondent has registered with the Court and has paid his attorney registration fees and bar dues through December 31, 1991. Respondent's current mailing address is 1001 Bishop Street, Suite 2450, Honolulu, Hawaii 96813.

Petitioner hereby alleges that Respondent has committed the following acts of unprofessional conduct:

A. From May 7 to May 25, 1984, Respondent represented Defendant Clifford M.M. Clarke ("Clarke") in *State of Hawaii v. Clifford M.M. Clarke, Sr.*, Criminal No. 59285 (First Circuit Court, State of Hawaii) (the "criminal action"). Clarke was charged with the murder of Ronnica Ann Arcala ("Ronnica"), the child of his girlfriend, Debra Lin Arcala ("Debra"), in violation of H.R.S. § 707-0701.

B. During trial on May 18, 1984, presiding Judge Leland H. Spencer provided Respondent with the opportunity to cross-examine Debra, the State's key witness. However, Respondent elected not to cross-examine Debra because he lacked possession of Family Court records

concerning both Ronnica and Debra which he felt were necessary for purposes of such cross-examination. Respondent had previously filed a motion for production of such records, which was then pending in Family Court.

C. At that time, Respondent requested that Debra's cross-examination be continued pending the resolution of the Family Court motion. However, the court denied his request for a continuance on the basis that Respondent had had ample opportunity to seek production of such records in the months preceding the criminal action.

D. On May 23, 1984, the Family Court granted Respondent's motion for production, and he was provided with the requested records. However, despite the fact that he was in possession of the records and the fact that Debra was present in court for the purpose of providing further testimony, Respondent again chose not to examine her.

E. On May 25, 1984, Respondent was provided with the opportunity to make final argument on Clarke's behalf. However, Respondent elected not to make final argument and, in addition, made the following statement to the court in the presence of the jury:

> Your Honor, in view of there being no cross-examination of Debra Lin Arcala, my client and I feel closing argument would be a waste of time.

F. Thereafter, the jury returned its verdict that Clarke was guilty as charged. On July 2, 1984, a Judgment and Sentence was entered in the criminal action. On July 12, 1984, Respondent filed a Notice of Appeal and Designation of Record on Appeal in No. 10041.

G. On August 1, 1984, Judge Spencer forwarded to Petitioner a written complaint against Respondent alleging that his failure to argue his client's case to the jury (including, at the very least, the argument that the State had failed to prove its case) constituted a violation of DR 7-101 (failure to zealously advocate his client's interests or to seek the lawful objectives of his client within the bounds of the law).

H. In addition, Judge Spencer. alleged that, by stating in the presence of the jury that final argument would be a "waste of time", Respondent intentionally attempted to make reversible error (i.e., to prejudice his client's case for the purpose of forcing an appellate court to reverse his client's anticipated conviction), in violation of DR 7-101(A)(3) (intentional prejudice or damage to his client during the course of the professional relationship).

I. On Augus t 10, 1984, Respondent forwarded to the Clerk of the First Circuit Court, State of Hawaii, a copy of Judge Spencer's complaint letter (which had been forwarded to him by Petitioner). In his letter to the Clerk, Respondent stated:

> Because this letter concerns the conduct of the above-entitled case, which is awaiting preparation of the Record on Appeal, I request that this letter of complaint with my cover letter be filed in the Circuit Court records and included in the Record on Appeal for consideration by the Supreme Court in the appeal.

J. On November 9, 1984, Respondent filed a Motion to Remand Case to Circuit Court for Limited Purpose of Hearing on Competence of Present Counsel (the "Motion") in No. 10041. In support of the Motion,

Respondent filed an affidavit which averred that Clarke had challenged his competence to represent him in the criminal case and had cited Judge Spencer's complaint as proof that Respondent had done "something wrong at trial."

K. In addition to his affidavit, Respondent also filed (as Exhibit B to the Motion) a copy of a letter he had received from Clarke which was addressed to Circuit Court Judge Robert W.B. Chang, stating:

> Judge Spencer also charged my Attorney for not making a closing argument at the end of my trial. At that time my Attorney Earl Partington suggested to me for not making a closing argument as a tactic to find pity from the jury at that time. I agreed because I didn't fully understand court procedures and tactic.
>
> Now I feel that I made the wrong decision in agreeing with my lawyer. Because I did want a closing argument but took my lawyer's advice.

L. On December 6, 1984, Respondent's Motion to Remand Case to Circuit Court was denied by Judge Chang.

M. On April 29, 1985, Respondent filed Appellant's Opening Brief on Clarke's behalf in No. 10041. The State of Hawaii's Answering Brief was filed on August 7, 1985.

N. On December 27, 1985, the Hawaii Supreme Court in No. 10041 filed its Memorandum Opinion in the Clarke appeal, in which the Court stated:

> Appellant raises numerous grounds on appeal, none of which we reach or decide because, in our view, the record is clear that the

appellant did not have the effective assistance of counsel at trial and that therefore we must reverse and remand for a new trial.

* * *

We are faced with a record in which appellant's trial counsel (1) refused to make an opening statement; (2) refused to cross-examine the mother of the victim, counsel's stated reason being that certain records with respect to the witness had not been made available to him; (3) subsequently refused to call the witness himself after the records were made available to him; (4) elicited testimony from two prosecution witnesses that they believed that the appellant was guilty; and (5) refused to make a closing argument.

At oral argument, appellant's counsel asserted that each of the above decisions was justifiable as a matter of tactics. We cannot agree. In our view, on this record, none of the five alleged tactical decisions which we have enumerated above (let alone all five considered together) was within the range of competency demanded of attorneys in criminal cases. *State v. Antone,* 62 Haw. 346, 615 P.2d 101 (1980). The effect was to substantially impair what defenses appellant had. *Antone, supra.*

O. On January 20, 1986, a Judgment on Appeal and Notice of Judgment on Appeal were filed, reversing and remanding the *Clarke* case for a new trial.

P. On January 27, 1986, Respondent filed a Certificate Pursuant to Rule 13 of the Rules of the Supreme Court of Hawaii in *In re: Earle A. Partington* (the "Rule 13 Proceedings"), based upon the Court's finding that

Clarke was rendered ineffective assistance of counsel at trial.

Q. On February 3, 1986, the Court entered its Order in the Rule 13 Proceedings appointing Joseph M. Gedan as Special Master to determine whether corrective action was warranted against Respondent and directing the Special Master and Respondent to comply with all applicable provisions of Rule 13.

R. On March 27, 1986, Respondent filed his Answer in the Rule 13 Proceedings. On August 19, 1986, Howard Chang, Esq., was appointed to prosecute the matter before the Special Master.

S. After substantial delays, primarily caused by Respondent's attempts to obtain injunctive relief (including the filing, on March 9, 1987, of a Complaint for Damages and Declarative and Injunctive Relief in *Earle A. Partington v. Joseph M. Gedan and Howard T. Chang*, Civil No. 87-0172 (United States District Court for the District of Hawaii)), and the filing of a Second Amended Complaint for Declaratory and Injunctive Relief on April 18, 1990 in *Jeffrey J. Lau and Earle A. Partington v. Herman T.F. Lum, Edward H. Nakamura, Frank D. Padgett, Yoshimi Hayashi, James H. Wakatsuki, Jeremy T. Harrison, Charlene M. Norris, Joseph M. Gedan, and Mark J. Bennett*, Civil No. 89-00400 (United States District Court, District of Hawaii)), a hearing was held in the Rule 13 Proceedings on July 9, 1990.

T. On July 22, 1990, then-Rule 13 Prosecutor Mark J. Bennett filed a Final Hearing Brief charging Respondent with violations of DR 7-101(A)(1) (due to his failure to seek the lawful objectives of his client when he made the

decision not to call Debra or to make closing argument), DR 7-101(A)(3) (due to his intentional failure to make closing argument, prejudicing his client during the course of the professional relationship), and DR 6-101(A)(3) (due to, *inter alia*, his failure to give an opening statement, or to call Debra as a witness, or to give closing argument, constituting neglect of a legal matter).

U. On July 31, 1990, Special Master Gedan filed his findings and conclusions, including, but not limited to, his finding that Respondent's conduct during the trial in the criminal action violated one or more Disciplinary Rules.

V. On September 24, 1990, the Hawaii Supreme Court issued its Order dismissing the Rule 13 Proceedings with prejudice, stating that it was inappropriate for the Special Master to address allegations of ethical violations in a Rule 13 Proceeding. The Court further stated:

> Allegations of ethical violations should be determined according to the procedures specified in Supreme Court Rule 2.
>
> The record reflects that such allegations have already been brought to the attention of the Disciplinary Counsel pursuant to Rule 2. This court expresses no opinion as to the merits of any such allegations.

W. On October 4, 1990, the Court reaffirmed its September 24, 1990 Order dismissing the Rule 13 Proceedings.

X. Prior to August 1989, Disciplinary Board policy precluded Petitioner from investigating the disciplinary

complaint filed by Judge Spencer pending the final disposition of the federal litigation and the completion of the Rule 13 Proceedings. However, pursuant to the Board's change in policy in August of 1989, Petitioner notified Respondent that the investigation would proceed and that a detailed written response was requested from Respondent.

Y. On August 21, 1989, Respondent replied to Petitioner's request, stating that Petitioner had no jurisdiction to conduct an investigation into his conduct in light of the commencement of Rule 13 Proceedings against him. Additionally, Respondent asserted that any inquiry into his trial strategy in the *Clarke* case was improper, since his client had invoked the attorney-client privilege and the Sixth Amendment right to counsel barred him from defending himself against a claim of ineffective assistance of counsel.

Z. On February 27, 1990 Respondent filed a Motion for Declaratory Relief, to Enjoin the Disciplinary Counsel from Proceeding, and for Recusal of the Present Justices and Retired Justice Nakamura in No. 10041. In his Motion, Respondent asserted that Petitioner "is without jurisdiction in this matter in the absence of either referral by the special master or a violation of the findings against Partington in *State v. Clarke* and a dismissal of the HSCR 13 proceeding with prejudice."

AA. On March 7, 1990, the Hawaii Supreme Court denied Respondent's Motion, stating in pertinent part:

> With respect to the request to enjoin Disciplinary Counsel from proceeding according to Supreme Court Rule 2, it being evident that

proceedings under Supreme Court Rule 13 and Supreme Court Rule 2 are not mutually exclusive,

IT IS FURTHER ORDERED that injunctive relief against the Office of Disciplinary Counsel is denied.

BB. From approximately August 1989 to February 1991, Respondent failed and refused to provide substantive replies to specific inquiries forwarded to him by Petitioner, based upon Respondent's assertions that: (1) proceedings under Supreme Court Rules 2 and 13 were mutually exclusive; (2) Petitioner's investigation constituted "intrusive post-trial inquiry"; and (3) Clarke had unequivocally invoked the attorney-client privilege and the matters inquired into were covered by the privilege. Respondent also demanded to know whether Petitioner viewed the issue of his ineffective assistance of counsel as having been finally adjudicated by the Hawaii Supreme Court in the *Clarke* case.

CC. Respondent's failure to provide the requested information to Petitioner continued despite the Hawaii Supreme Court's March 7, 1990 determination (cited in Paragraph AA above) and despite rulings contrary to his assertions which were rendered in the federal litigation (Civil No. 87-0172 and Civil No. 89-00400).

DD. Respondent's refusal to make an opening statement, refusal to cross-examine Debra (his stated reason being that certain records with respect to the witness had not been made available to him), refusal to call Debra himself after the records were made available to him, eliciting of testimony from two prosecution witnesses that they believed Clarke was guilty, and refusal to make

a closing argument at trial in the *Clarke* case (all as more particularly set forth in Paragraphs A through N), constitute violations of the following provisions of the Hawaii Code of Professional Responsibility:

1. *DR 6-101(A)(3)* (prohibiting neglect of a legal matter entrusted to him);

2 *DR 7-101 (A)(1)* (failure to seek the lawful objectives of his client through reasonably available means provided by law);

3. *DR 7-101(A)(3)* (prejudice or damage to the client during the course of the professional relationship); and

4. *DR 1-102(A)(5) and (6)* (conduct prejudicial to the administration of justice and conduct adversely reflecting on fitness to practice law, respectively).

WHEREFORE, Petitioner respectfully requests that this matter be assigned to a hearing committee and that proceedings be commenced to provide a recommendation to the Disciplinary Board concerning the appropriate discipline which should be imposed upon Respondent Petitioner further requests that it recover its costs from Respondent relating to this proceeding.

DATED: Honolulu, Hawaii, July 8, 1991.

OFFICE OF DISCIPLINARY
COUNSEL

/s/ Charlene M. Norris
GERALD H. KIBE
Chief Disciplinary Counsel
CHARLENE M. NORRIS
Assistant Disciplinary Counsel

Petitioner

EXHIBIT 2

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL, Petitioner, vs. EARLE A. PARTINGTON, SR., Respondent.	ODC 84-065-1467 ANSWER; CERTIFICATE OF SERVICE DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT RECEIVED 23rd DAY Oct. MONTH 1991 YEAR TIME: 4:15 p.m. BY [Illegible]

ANSWER

Denial

Because the Office of Disciplinary Counsel has alleged that each and every paragraph of the Petition alleges acts of unprofessional misconduct committed by Respondent, Respondent hereby denies each and every paragraph of the Petition. However, Respondent notes that paragraphs O through CC appear to be meaningless surplusage as paragraph DD alleges only that Respondent's conduct as set out in paragraphs A through N constitutes violations of the Hawaii Code of Professional Responsibility

First Defense

The Petition fails to allege any facts upon which there can be any finding made that Respondent violated the Hawaii Code of Professional Responsibility or to give notice how or why Respondent's conduct violated the Hawaii Code of Professional Responsibility in that each and every one of the acts and omissions of Respondent may have been a legitimate trial tactic and there is *no* evidence to indicate otherwise. In other words, the Petition fails to state a claim.

Second and Subsequent Defenses

The instant proceeding has been brought by the Office of Disciplinary Counsel in bad faith and is abuse of its power in violation of the federal and state constitutional rights to free speech, due process, right to counsel, and equal protection (as contained in §§ 4, 5, and 14 of the Hawaii Constitution and the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution) for the purposes of harassment, intimidation, and retaliation against Respondent, who has had the courage to stand up to the tyranny that some of the present justices of the Supreme Court of Hawaii are trying to impose on the criminal defense bar in Hawaii (as more fully set out in Exhibit A attached which is incorporated herein).

Prayer

Wherefore, Respondent respectfully requests that this Petition be dismissed, that the Office of Disciplinary

Counsel be censured for abusing its power in bringing this specious Petition, and that costs and attorney's fees be awarded to Respondent.

DATED: Honolulu, Hawaii, October 23, 1991.

/s/ Earle A. Partington
Earle A. Partington
Respondent

CERTIFICATE OF SERVICE

I hereby certify one (1) copy of the foregoing document was duly served on October 23, 1991, by hand delivery of same to the offices of the following:

CHARLENE M. NORRIS
Assistant Disciplinary Counsel
Office of Disciplinary Counsel
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813

/s/ Earle A. Partington
Earle A. Partington
Respondent

EXHIBIT 3

GERALD H. KIBE
Chief Disciplinary Counsel
CHARLENE M. NORRIS
Assistant Disciplinary Counsel
Office of Disciplinary Counsel
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813
Telephone: 521-4591

Attorneys for Petitioner

DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT
RECEIVED
5th DAY May MONTH 1992 YEAR
TIME: 3:10 pm.
BY [Illegible]

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL, Petitioner, v. EARLE A. PARTINGTON, Respondent.	ODC 84-065-1467 PETITIONER'S EXHIBIT LIST

PETITIONER'S EXHIBIT LIST

The Office of Disciplinary Counsel (Petitioner) hereby submits its List of Exhibits, which is attached hereto as Exhibit I, and copies of Exhibits.

Copies of Exhibits A, B, and C have not been received from the Legal Documents Sections of the First Circuit Court and the Hawaii Supreme Court, respectively. Copies of these Exhibits will be transmitted to the Hearing Committee Members and Respondent upon receipt of same from the First Circuit Court and Hawaii Supreme Court.

DATED: Honolulu, Hawaii, May 5, 1992.

OFFICE OF DISCIPLINARY COUNSEL

/s/ Charlene M. Norris
GERALD H. KIBE
CHIEF DISCIPLINARY COUNSEL
CHARLENE M. NORRIS
ASSISTANT DISCIPLINARY COUNSEL

Petitioner

PETITIONER'S EXHIBITS

Exh. No.	Description	In Evid.	For Ident.
A	Certified copy of Court file in State of Hawaii v. Clifford M.M. Clarke, Sr., Criminal No. 59285 (First Circuit Court, State of Hawaii).		
B	Copy of Transcript of Trial in State of Hawaii v. Clifford M.M. Clarke, Sr., No. 10041 (Criminal No. 59285) (Supreme Court, State of Hawaii)		
C	Certified copy of Court file in State of Hawaii v. Clifford M.M. Clarke, Sr., No. 10041 (Supreme Court, State of Hawaii).		
C-1	Decision and Order of Special Master filed on July 31, 1990 in No. 10041 (Supreme Court, State of Hawaii).		
D	Letter from Judge Leland H. Spencer to Disciplinary Counsel dated August 1, 1984, with attachments.		
E	Copy of letter from Earle A. Partington to Clerk, First Circuit Court dated August 10, 1984, with attachments.		
F	Copy of letter from Earle A. Partington to Disciplinary Counsel dated December 17, 1984.		
G	Copy of Memorandum Opinion in State of Hawaii v. Clifford M.M. Clarke, No. 10041 (Supreme Court, State of Hawaii) filed on December 27, 1985.		
H	Copy of letter from Thomas P. Rack to Joseph M. Gedan dated January 6, 1989.		
I	Copy of letter from Thomas P. Rack to Earle A. Partington dated May 30, 1989.		
J	Letter from Joseph M. Gedan to Charlene M. Norris dated July 17, 1989, with attachments.		

Exh. No.	Description	In Evid.	For Ident.
K	Copy of letter from Charlene M. Norris to Earle A. Partington dated August 16, 1989 (without enclosure).		
L	Letter from Earle A. Partington to Charlene M. Norris dated August 21, 1989.		
M	Letter from Judge Leland H. Spencer to Charlene M. Norris dated August 28, 1989.		
N	Copy of letter from Charlene M. Norris to Earle A. Partington dated January 31, 1990.		
O	Letter from Earle A. Partington to Charlene M. Norris dated February 5, 1990.		
P	Copy of letter from Charlene M. Norris to Earle A. Partington dated February 23, 1990 (without enclosure).		
Q	Letter from Earle A. Partington to Charlene M. Norris dated February 27, 1990.		
R	Letter from Earle A. Partington to Charlene M. Norris dated March 12, 1990, with attachments.		
S	Copy of letter from Charlene M. Norris to Earle A. Partington dated March 13, 1990, with attachment.		
T	Letter from Earle A. Partington to Charlene M. Norris dated April 26, 1990, with attachment.		
U	Letter from Christopher R. Evans to Charlene M. Norris dated April 27, 1990, with attachments.		
V	Copy of letter from Charlene M. Norris to Christopher Evans, Esq., dated May 10, 1990 (without enclosure).		
W	Letter from Christopher R. Evans to Charlene M. Norris dated May 29, 1990.		

Exh. No.	Description	In Evid.	For Ident.
X	Letter from Earle A. Partington to Charlene M. Norris dated May 30, 1990, with attachments.		
Y	Copy of letter from Charlene M. Norris to Earle A. Partington dated October 16, 1990 (without enclosure).		
Z	Letter from Earle A. Partington to Charlene M. Norris dated October 18, 1990.		
AA	Copy of letter from Charlene M. Norris to Earle A. Partington dated October 19, 1990.		
BB	Letter from Earle A. Partington to Charlene M. Norris dated October 22, 1990.		
CC	Copy of letter from Charlene M. Norris to Earle A. Partington dated October 31, 1990 (without enclosure).		
DD	Letter from Earle A. Partington to Charlene M. Norris dated November 6, 1990.		
EE	Copy of letter from Charlene M. Norris to Earle A. Partington dated November 8, 1990.		
FF	Letter from Earle A. Partington to Charlene M. Norris dated November 13, 1990, with attachment.		
GG	Copy of letter from Charlene M. Norris to Earle A. Partington dated November 16, 1990.		
HH	Letter from Earle A. Partington to Charlene M. Norris dated November 26, 1990.		
II	Copy of letter from Gerald H. Kibe to Earle A. Partington dated November 29, 1990.		
JJ	Copy of letter from Charlene M. Norris to Earle A. Partington dated December 4, 1990.		

Exh. No.	Description	In Evid.	For Ident.
KK	Letter from Earle A. Partington to Charlene M. Norris dated January 11, 1991.		
LL	Copy of letter from Charlene M. Norris to Earle A. Partington dated January 23, 1991.		
MM	Letter from Earle A. Partington to Charlene M. Norris dated February 3, 1991.		
NN	Copy of Opinion in the consolidated cases of Partington v. Gedan and Lau v. Lum, No. 90-15942 (Civil No. 87-0172) and No. 91-15194 (Civil No. 89-0400) (United States Court of Appeals, Ninth Circuit); copies of prior Orders filed on July 6, 1987, February 26, 1990, May 11, 1990, May 14, 1990, May 25, 1990, July 3, 1990, July 6, 1990, July 25, 1990, December 17, 1990, December 20, 1990, January 7, 1991, February 19, 1991, March 18, 1991 and October 16, 1991.		
OO	Certified copy of court file in Earle A. Partington, Jeffrey J. Lau, and Clifford M.M. Clarke v. Charlene M. Norris, Gerald H. Kibe, and Christopher R. Evans, Civil No. 91-00691 (United States District Court, District of Hawaii.		

EXHIBIT 4

GERALD H. KIBE
Chief Disciplinary
Counsel
CHARLENE M. NORRIS
Assistant Disciplinary
Counsel
1164 Bishop Street,
Suite 600
Honolulu, Hawaii 96813

Attorneys for Petitioner

DISCIPLINARY
BOARD OF
THE HAWAII
SUPREME
COURT
RECEIVED
5th DAY May MONTH 1992 YEAR
TIME: 3:10 pm.
BY [Illegible]

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL, Petitioner, v. EARLE A. PARTINGTON, Respondent.	ODC 84-065-1467 PETITIONER'S WITNESS LIST

PETITIONER'S WITNESS LIST

The Office of Disciplinary Counsel (Petitioner) hereby submits the following list of witnesses (together with a summary of the matters to which each witness will testify).

1. The Honorable Leland H. Spencer
   Judge, First Circuit Court
   P.O. Box 619
   Honolulu, Hawaii 96809

   Judge Spencer will testify as to his observations, perceptions, and assessment of Mr. Partington's conduct throughout the trial in *State v. Clarke.*

2. The Honorable Frank D. Padgett
   Retired Associate Justice,
   Hawaii Supreme Court
   P.O. Box 2560
   Honolulu, Hawaii 96804

   Former Justice Padgett will testify regarding the Hawaii Supreme Court's rationale for the Memorandum Opinion issued on December 27, 1985, and his assessment of Mr. Partington's trial conduct.

3. Custodian of Records of the Hawaii
   Supreme Court
   417 S. King Street
   Honolulu, Hawaii 96813

   Authentication of records in
   State v. Clarke.

4. Custodian of Records of the United States
   District Court for the
   District of Hawaii
   300 Ala Moana Boulevard
   Honolulu, Hawaii 96850

   Authentication of records in
   Partington v. Norris.

5. Christopher R. Evans, Esq.
   212 Merchant Street, Ste. 300
   Honolulu, Hawaii 96813

Mr. Evans will testify regarding: (a) problems which he encountered in defending Clifford Clarke in his second trial (caused by Respondent's misconduct in the first trial); and (b) Clarke's communication to Evans and Mark Bennett, Esq., regarding Mr. Partington's trial conduct (including the circumstances surrounding Clarke's waiver of the attorney/client privilege).

6. Earle A. Partington, Esq.
1001 Bishop Street, Ste. 2450
Honolulu, Hawaii 96813

Mr. Partington will be questioned regarding his trial strategy, the underlying rationale for such strategy, and his conduct as defense counsel in *State v. Clarke.*

7. Mark J. Bennett, Esq.
Adjunct Professor, Criminal Procedure
University of Hawaii
500 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96850

Mr. Bennett will testify regarding his role as prosecutor in the Rule 13 proceedings, his communications with Clifford M.M. Clarke, and his assessment of Mr. Partington's trial conduct.

8. Joseph M. Gedan, Esq.
345 Queen Street, Ste. 200
Honolulu, Hawaii 96813

Mr. Gedan will testify regarding his role as the Rule 13 Master and his assessment of Mr. Partington's, trial conduct.

9. Clifford M.M. Clarke
Kulani Honor Camp
Kula, Maui [sic]

Mr. Clarke will testify regarding his observations and perceptions of Mr. Partington's trial conduct, the advice Mr. Partington gave Clarke regarding his trial strategy (if any), Clarke's letter to Judge Won Bae Chang, and his communications with Messrs. Evans and Bennett.

10. Richard W. Pollack, Esq.
Office of the Public Defender
1130 N. Nimitz Highway, Ste. A-135
Honolulu, Hawaii 96817

Mr. Pollack will testify regarding his knowledge of Mr. Partington's trial strategy in *State v. Clarke,* and whether he has observed similar conduct in other criminal trials.

11. Janice T. Futa, Esq.
Greeley Walker & Kowen
1001 Bishop Street, Ste. 1300
Honolulu, Hawaii 96813

Ms. Futa will testify regarding her observations, perceptions, and assessment of Mr. Partington's trial conduct in *State v. Clarke.*

12. John A. Weiss, Esq.
Respondent's Counsel
P.O. Box 1167
Tallahassee, Florida 32302

Mr. Weiss will relate his knowledge regarding discipline which has been imposed upon attorneys in other states for conduct similar to Partington's trial conduct in *State v. Clarke.*

13. The Honorable Marie N. Milks
Judge, First Circuit Court
P.O. Box 619
Honolulu, Hawaii 96809

Judge Milks will testify regarding her knowledge and assessment of Mr. Partington's trial strategy in *State v. Clarke,* and whether she has observed similar conduct in other criminal trials.

14. Richard Ney, Esq.
Office of the Federal Public Defender
PJKK Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Mr. Ney will testify regarding his knowledge of Mr. Partington's trial strategy in *State v. Clarke,* and whether such conduct would constitutes ineffective assistance of counsel as the basis for an appeal from a criminal conviction.

15. Addison M. Bowman, Esq.
Professor of Law
University of Hawaii
2515 Dole Street
Honolulu, Hawaii 96822

Professor Bowman will testify regarding his assessment of Mr. Partington's trial conduct in *State v. Clarke.*

16. Judge Ronald Stovitz (former
California Bar Counsel)
Office of the State Bar Court
100 Van Ness Avenue
San Francisco, California 94102-5238

Judge Stovitz will relate his knowledge regarding discipline which has been imposed upon attorneys in other states for conduct similar to Partington's trial conduct in *State v. Clarke.*

Petitioner reserves the right to call additional witnesses as may be deemed necessary upon the submission

of Respondent's witness and exhibit lists. Petitioner also reserves the right to call such rebuttal witnesses as necessary.

DATED: Honolulu, Hawaii, May 5, 1992.

OFFICE OF DISCIPLINARY COUNSEL

/s/ Charlene M. Norris
GERALD H. KIBE
Chief Disciplinary Counsel
CHARLENE M. NORRIS
Assistant Disciplinary Counsel

Petitioner

EXHIBIT 5

GERALD H. KIBE
Chief Disciplinary Counsel
CHARLENE M. NORRIS
Assistant Disciplinary Counsel
Office of Disciplinary Counsel
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813
Telephone: 521-4591

Attorneys for Petitioner

DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT
RECEIVED
6th DAY May MONTH 1992 YEAR
TIME: 10:42 a.m.
BY [Illegible]

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL,	)	ODC 84-065-1467
Petitioner,	)	PREHEARING ORDER
v.	)	
EARLE A. PARTINGTON,	)	
Respondent.	)	

PREHEARING ORDER

A Prehearing Conference was held in this matter on April 7, 1992 in the Office of Disciplinary Counsel. Present were: the Hearing Committee (Gerald Y. Sekiya, Esq., Chairperson; Rosemary T. Fazio, Esq., Member; and Michael C. Webb, Esq., Member); Charlene M. Norris, Assistant Disciplinary Counsel, for Petitioner; and Earle A. Partington, Esq., Respondent *pro se*. Also present was Karen Essene, Esq.

Based upon matters discussed at the Prehearing Conference, the Hearing Committee hereby orders as follows:

1. Petitioner will file its Exhibit and Witness Lists (and will circulate copies of its proposed Exhibits) on or before May 5, 1992.

2. Respondent will file his Exhibit and Witness Lists (and will circulate copies of his proposed Exhibits) on or before July 6, 1992.

3. Respondent will file his objections, if any, to Petitioner's exhibits and witnesses by July 6, 1992.

4. The parties will file any motions on or before August 10, 1992.

5. Responsive memoranda (regarding motions) will be filed on or before August 17, 1992, and reply memoranda will be filed on or before August 24, 1992.

6. A Second Prehearing Conference will be held on August 31, 1992, at 3:00 p.m. in the Office of Disciplinary Counsel for the purpose of hearing argument on any motions filed by the parties and to discuss further procedural matters (if any).

7. The formal hearing will be held on Monday, September 14, 1992, commencing at 9:00 a.m. in the Office of Disciplinary Counsel.

8. Respondent has objected to the composition of the Hearing Committee on the ground that none of its members have any significant criminal law experience; however, after careful consideration, the Committee members concluded that Respondent will receive a fair and just hearing and have declined to recuse themselves.

The Hearing Committee further notes that Respondent is urged to retain counsel to represent him in these proceedings.

DATED: Honolulu, Hawaii, April 30, 1992.

/s/ Gerald Y. Sekiya.
GERALD Y. SEKIYA
Chairperson,
Hearing Committee

APPROVED AS TO FORM:

/s/ Earle A. Partington
EARLE A. PARTINGTON
Respondent, *pro se*

OFFICE OF DISCIPLINARY COUNSEL V. EARLE A. PARTINGTON (ODC 84-065-1467), Prehearing Order.

EXHIBIT 6

(SEAL)

Office of Disciplinary Counsel
Supreme Court • State of Hawaii
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813
Telephone (808) 521-4591

Gerald H. Kibe
Chief Disciplinary Counsel

Charlene M. Norris
Carole R. Richelieu
Brian C. Means
Assistant Disciplinary Counsel

Scott G. O'Neal
Investigator

Disciplinary Board

Helen Gillmor
Chairperson

Dwight M. Rush
Vice Chairperson

Clifford L. Nakea
Secretary

Ellen Godbey Carson
C. Jepson Garland
Madeline J. Goodman, Ph.D.
John Jubinsky
James H. Kamo
Linda K.C. Luke
Dorothy Lum
B. Martin Luna
Marjorie H. Manuia
Robert F. Mougeot, C.P.A.
Gregory G. Ogin
Carolyn Staats. Ph.D.
Manuel R. Sylvester, C.P.A.
Peter C. Wolff, Jr.
Stanley F.H. Wong, D.D.S.

CONFIDENTIAL

October 16, 1990

Earle A. Partington, Esq.
Partington & Foley
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813

Re: ODC 1467
Judge Leland H. Spencer, Complainant

Dear Mr. Partington:

Thank you for your letter dated April 26, 1990 responding in part to the inquiries posed in my letter of January 31, 1990 (copy enclosed). It is noted that you have thus far failed to respond to the majority of my inquiries (contained in questions 1, 2, and 6 of that letter).

Although you state that your client is "satisfied" with you representation, the transcript of Mr. Clarke's statement to Mr. Bennett on April 20, 1990 reflects otherwise (in addition, Rule 2.6(a), Rules of the Supreme Court of Hawaii ("RSCH"), grants authority to Disciplinary Counsel to "investigate all matters involving alleged misconduct called to his [or her] attention whether by complaint or otherwise"; the Rule does not limit this investigative authority to complaints filed solely by clients).

You have asked what you are alleged to have done, and you have referred to my investigation as "intensive post-trial scrutiny". As you were previously informed, the focus of my investigation involves an inquiry into whether you have violated DR 6-101(A)(2) and (3) (handling a legal matter without adequate preparation and neglecting a legal matter, respectively) and DR 7-101(A)(3) (prejudicing or damaging the client during the course of the professional relationship).

Your refusal to provide substantive responses to the inquiries contained in questions 1, 2, and 6 of my January 31, 1990 letter may also be deemed a failure to cooperate in an ethics investigation in violation of DR 1-102(A)(5)

and (6) (conduct prejudicial to the administrtion of justice and conduct adversely reflecting on fitness to practice law, respectively).

You have discussed your responsibilities pursuant to DR 4-101(A)(1). However, you have failed to address my prior references to your permitted conduct under DR 4-101(C)(4). For example, in light of the confidentiality of these proceedings pursuant to Rule 2.22, RSCH, please state the reasons for your position that the information requested by this office will in any way harm your former client, Mr. Clarke. Additionally, I would appreciate an explanation regarding how your candid responses in this matter would affect Mr. Clarke's "right of independence of counsel".

Finally, I see no support for your reference to my "breach" of the "presumption of effectiveness" in light of the Hawaii Supreme Court's precise determination that none of your alleged tactical decisions was within the range of competency demanded of attorneys in criminal cases, and that the effect of your conduct was to substantially impair what defenses the appellant had. As you are aware, the Court's latest Order acknowledged that "Disciplinary Counsel may conduct an independent investigation pursuant to Rule 2".

In connection with such investigation, please provide the following information:

1. Please confirm whether the averments contained in the Affidavit of Christopher R. Evans sworn on March 16, 1987 were made as a result of your direct request to Mr. Evans. If so, describe the substance of your discussion with Mr. Evans.

2. Please state the basis for your contention that the five acts or omissions, as set forth in your Second Amended Complaint in *Lau v. Lum*, were reasonable and prudent tactical decisions. Please describe the pertinent facts of the case, the applicable law, and the consultation you undertook with Mr. Clarke which led you to make such tactical decisions.

3. Please state the reason(s) for your original intention not to make an opening statement in the *Clarke* case, and the reason(s) that you failed to make an opening statement immediately after hearing Ms. Futa's remarks. (*See* Transcript of Proceedings on May 16, 1984, Pages 7-8).

4. Please state the specific reason(s) for your failure to present any evidence or argument at trial in support of the defenses that: (1) Mr. Clarke lacked the requisite intent to cause the child's death; and/or (2) the child's death was actually caused by the mother's actions.

5. Please confirm that you initially failed to cross-examine Debralin Arcala because you did not have certain DSSH records. Please state the reason(s) that you failed to recall Debralin *after* you had acquired the DSSH records. Please explain the reason(s) you failed to discuss your decision with Mr. Clarke. (*See* Transcript of April 20, 1990 Interview of Clifford Clarke, Sr., Page 12).

6. Please confirm whether you had any discussions with Mr. Clarke *prior* to his trial regarding appropriate trial strategies and/or tactics in connection with his defense. If so, please describe the substance of those discussions. (*See* Transcript of April 20, 1990 Interview with Clifford Clarke, Sr., Page 7).

7. Please confirm whether you had any discussions with Mr. Clarke *during* his trial regarding appropriate trial strategies and/or tactics in connection with his defense. If so, please describe the substance of those discussions.

8. Please state whether, contrary to Mr. Clarke's assertion (in his letter to Judge Robert Won Bae Chang dated October 30, 1984), he appeared to understand court procedures and the tactics you discussed with him prior to, and during, his trial.

9. Please state whether, as Mr. Clarke asserted in his letter to Judge Chang, he expressed his desire that you present closing argument but that he ultimately followed your advice; and if so, please indicate what specific advice was given to him. (*See* transcript of April 20, 1990 Interview with Clifford Clarke, Sr., Page 13).

10. Please confirm that, as represented in your letter to this office dated December 17, 1994 (copy enclosed), your decision not to make a closing argument was: (1) based upon Judge Spencer's manifested "bias" in the course of the trial; and (2) a ploy to gain sympathy from the jury. Please also confirm whether you raised Judge Spencer's "interference in the attorney-client relationship" as an issue on appeal.

11. Please respond directly to Mr. Clarke's affirmative reply (in the April 20, 1990 interview) to the question whether he had the impression that you intentionally failed to make a closing argument so as to cause reversal on appeal.

Please respond within two weeks of the above date, (on or before October 30, 1990). At that time, an evaluation will be made in this matter.

Very truly yours,

/s/ Charlene M. Norris
CHARLENE M. NORRIS
ASSISTANT DISCIPLINARY COUNSEL

fh
enclosure

EXHIBIT 7

(SEAL)

Office of Disciplinary Counsel
Supreme Court • State of Hawaii
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813
Telephone (808) 521-4591

Gerald H. Kibe
Chief Disciplinary Counsel

Charlene M. Norris
Carole R. Richelieu
Brian C. Means
Assistant Disciplinary Counsel

Scott G. O'Neal
Investigator

Disciplinary Board

Helen Gillmor
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Gregory G. Ogin
Carolyn Staats, Ph.D.
Manuel R. Sylvester, C.P.A.
Peter C. Wolff, Jr.
Stanley F.H. Wong, D.D.S.

CONFIDENTIAL

October 19, 1990

Earle A. Partington, Esq.
Partington and Foley
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813-3608

Re: ODC 1467
Judge Leland H. Spencer, Complainant

Dear Mr. Partington:

This will respond to your letter dated October 18, 1990 requesting clarification.

This will confirm that, given the Hawaii Supreme Court's final adjudication that your conduct in *State v. Clarke* constituted ineffective assistance of counsel, this office's investigation is limited to a determination regarding whether all of the circumstances attendant to your conduct supports a finding of a violation of *any* provision of the Hawaii Code of Professional Responsibility.

If you should have further questions, please let me know.

Very truly yours,

/s/ Charlene M. Norris
CHARLENE M. NORRIS
ASSISTANT DISCIPLINARY COUNSEL

fh

EXHIBIT 8

(SEAL)

Office of Disciplinary Counsel
Supreme Court • State of Hawaii
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813
Telephone (808) 521-4591

Gerald H. Kibe
Chief Disciplinary Counsel

Charlene M. Norris
Carole R. Richelieu
Brian C. Means
Assistant Disciplinary Counsel

Scott G. O'Neal
Investigator

Disciplinary Board

Helen Gillmor
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Dwight M. Rush
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Carolyn Staats, Ph.D.
Manuel R. Sylvester, C.P.A.
Peter C. Wolff, Jr.
Stanley F.H. Wong, D.D.S.

CONFIDENTIAL

October 31, 1990

Earle A. Partington, Esq.
Partington and Foley
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813-3608

Re: ODC 1467
Judge Leland H. Spencer, Complainant

Dear Mr. Partington:

This will respond to your letter dated October 22, 1990 requesting further clarification of my letter to you dated October 19, 1990.

You specifically inquire whether the December 1985 adjudication of your ineffective assistance of counsel by the Hawaii Supreme Court in *State v. Clarke* is binding and conclusive (i.e., res judicata) against you (on the issue of whether you rendered ineffective assistance of counsel to Clarke) in my investigation as well as in any disciplinary proceedings which might be brought against you by this office.

You also ask whether my investigation has expanded since my letter of October 16, 1990, in light of my statement in that letter that my investigation "is limited to a determination regarding whether all of the circumstances attendant to your conduct supports a finding of a violation of *any* provision of the Hawaii Code of Professional Responsibility."

In answer to your first inquiry, please be advised that I am not in a position to comment or rule upon the res judicata effect of any matters involved in your various cases. Nevertheless, under this office's procedural rules, you have been, and still are, afforded a full opportunity to explain the detailed circumstances attendant to your representation of Mr. Clarke and whether that representation violated any provision of the Hawaii Code of Professional Responsibility. As you are aware, my investigation is a separate, independent inquiry from that which was previously conducted under Rule 13; and as such, this office is not required to be bound by any court's decision or any other proceeding. Of course, if you do not present any evidence in this matter, an evaluation of your conduct will be made based upon the documentary evidence presented to date.) [sic]

In reply to your second inquiry, the scope of my investigation has not been expanded. However, based upon the information I have at the time that an evaluation of your conduct is made, additional rule violations may be considered.

Enclosed please find copies of your December 17, 1984 letter to this office and portions of the transcripts in *State v. Clarke*, per your request. An extension for your reply to

my October 16, 1990 letter is granted to November 14, 1990.

Very truly yours,

/s/ Charlene M. Norris
CHARLENE M. NORRIS
ASSISTANT DISCIPLINARY COUNSEL

fh
enclosures

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)	CR. NO. 59285

CERTIFICATE OF SERVICE

I hereby certify that I caused one copy of the foregoing document to be duly served by hand delivery on the persons named below at the addresses below on June 19, 1992:

ATTORNEY GENERAL
Office of Attorney General
425 Queen Street
Honolulu, Hawaii 96813

CHARLENE M. NORRIS
Office of Disciplinary Counsel
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813

GERALD H. KIBE
Office of Disciplinary Counsel
1164 Bishop Street, Suite 600
Honolulu, Hawaii 96813

PAUL T. MURAKAMI
Pacific Park Plaza, Suite 1475
711 Kapiolani Boulevard
Honolulu, Hawaii 96813
Attorney for Clifford M.M. Clarke, Sr.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

RULES OF THE SUPREME COURT OF THE STATE OF HAWAII

As Amended April 16, 1984
Effective June 1, 1984*
With Further Amendments as Noted

Rule 2. DISCIPLINARY RULES.

2.1. Jurisdiction. Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the supreme court and the Board hereinafter established.

Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit any voluntary bar association from censuring a member or suspending or expelling a member from membership in the association.

---

* Large portions of the former Rules of the Supreme Court were deleted and superseded by the Order Adopting Hawaii Rules of Appellate Procedure and Superseding Certain Other Rules filed April 16, 1984, effective June 1, 1984. Pursuant to that Order, remaining rules have been renumbered.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders.)

2.2. Grounds for Discipline.

(a) The Code of Professional Responsibility, attached hereto as Exhibit A, as amended by this court shall govern the conduct of all attorneys subject to discipline under this rule.

(b) Acts or omissions by an attorney which violate the Code of Professional Responsibility shall constitute misconduct and shall be ground for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. Conviction of a crime shall similarly be ground for discipline as set forth in Rule 2.13.

(Renumbered September 1984.)

2.3. Types of Discipline.

(a) Discipline may consist of:

(1) Disbarment by the supreme court; or

(2) Suspension by the supreme court for a period not exceeding five years; or

(3) Public censure by the Supreme Court; or

(4) Public reprimand by the Disciplinary Board with the consent of the respondent; or

(5) Private reprimand by the Disciplinary Board with the consent of the respondent; or

(6) Private informal admonition by Disciplinary Counsel.

(b) Where a respondent has, with the written concurrence of the Director of the Attorneys and Judges Assistance Program, proposed a program of monitoring of the respondent's efforts toward rehabilitation from "substance abuse" (as that term is defined in Rule 16.1(a) of this court), this court or the Board may impose such a monitoring program. The monitoring program, which shall in all cases be supervised by the Director of the Attorneys and Judges Assistance Program, may be in lieu of or in addition to a disciplinary sanction. The duration and conditions of monitoring shall be stated in the final order issued by this court or the Board. Violation of any conditions of monitoring shall result in the imposition of disciplinary sanctions, but only to the extent set forth in the order establishing the monitoring program.

(c) Restitution and/or payment of costs (exclusive of attorney's fees) may also be ordered by this court, or, if consented to by an attorney, may be included among the terms of a public or private reprimand by the Board.

(Renumbered September 1984; amended November 8, 1991, effective November 8, 1991.)

2.4. Disciplinary Board.

(a) The supreme court shall appoint a board to be known as the "Disciplinary Board of the Hawaii Supreme Court" (hereinafter referred to as the "Board") which shall consist of eighteen members, and shall include the offices of Chairperson and Vice-Chairperson, each of

which shall be nominated and appointed separately. All appointments shall be made from a list of nominees submitted by the governing Board may, but need not, also be members of the Disciplinary Board.

(b) All members shall be appointed to staggered three-year terms; however, to maintain a Board with staggered terms, initial appointments may be for less than three years. The Board shall act only with the concurrence of seven or more members. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(c) Board members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. If, in any given case, it shall become necessary for the continuation of a case, or the orderly operation of the Board, the supreme court may appoint, for that case only, one or more ad hoc members as it deems necessary. Each ad hoc member shall fulfill all the responsibilities of a Board member.

(d) Periodically, the Chairperson shall designate at least two Board members to review the proposed decisions of the Disciplinary Counsel, as mentioned in subsection 2.7 hereof.

(e) The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Disciplinary Rules, including the power and duty:

(1) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such

action with respect thereto as shall be appropriate to effectuate the purpose of these Disciplinary Rules.

(2) To appoint a Chief Disciplinary Counsel, and such Assistant Disciplinary Counsel and staff of employees and/or volunteers as may from time to time be required to properly perform the functions hereinafter prescribed. The Chief Disciplinary Counsel and Assistant Disciplinary Counsel are hereinafter referred to as "Counsel."

(3) To appoint from time to time, and establish the terms of office of, an appropriate number of hearing committees.

(4) To approve assignments made annually by the Chairperson for rotation of members of the Board to review for stated periods all recommended dispositions by Counsel and to authorize changes in such assignments from time to time necessitated by unforeseen circumstances.

(5) To adopt rules of procedure governing the Board and hearing committees which are not inconsistent with these rules.

(6) To adopt and publish advisory opinions interpreting the Code of Professional Responsibility.

(7) To develop in consultation with the Board of Directors of the Hawaii State Bar an annual budget for the operation of the Office of Disciplinary Counsel and performing the functions of the Board.

(8) To receive from the Bar funds for the annual budget of the Board; to prepare and maintain appropriate accounting records showing the receipt and disposition of

those funds, which records shall be subject to audit; and to prepare an annual budget for the expenditure of those funds.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.5. Hearing Committees.

(a) Each hearing committee shall consist of three members, at least two of whom shall be members of the bar of this state. The Board shall designate the terms of its members and the chairperson for each committee. Each committee shall act only with the concurrence of a majority of its members. Committee members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(b) Hearing committees shall have the power to conduct hearings in formal disciplinary proceedings and on petitions for reinstatement of disbarred or suspended attorneys, upon assignment by the Chairperson of the Board, and to submit their findings and recommendations, together with the record of the proceeding, to the Board.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.6. Disciplinary Counsel.

(a) Counsel shall not engage in private practice, except that the Board may agree to a reasonable period of transition after appointment.

(b) Counsel shall have the power and duty:

(1) With the approval of the Board, to employ and supervise staff and volunteers needed for the performance of his or her duties.

(2) To investigate all matters involving alleged misconduct called to his or her attention whether by complaint or otherwise.

(3) To dispose, subject to review by members of the Board assigned by the Chairperson, of all matters involving alleged misconduct by dismissal, private informal admonition or the institution of formal disciplinary proceedings before a hearing committee. Except in matters requiring dismissal because the complaint is frivolous on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Counsel until the accused attorney shall have been afforded the opportunity to state his or her position with respect to the allegations against him or her.

(4) To file with the supreme court certificates of conviction of attorneys for crimes.

(5) To prosecute all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing committees, the Board and the supreme court.

(6) To appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, to examine witnesses and to submit evidence, if any, relevant thereto.

(7) To maintain permanent records of all matters processed and the disposition thereof.

(8) To assist members of the public in preparation of requests for investigation.

(9) To perform such other duties and provide such reports as the Board shall direct.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.7. Procedure.

(a) Investigation. All investigations, whether upon complaint or otherwise, shall be conducted under the supervision of Counsel. Upon the conclusion of an investigation, Counsel shall recommend dismissal, informal admonition of the attorney concerned or the institution of formal disciplinary proceedings before a hearing committee. Counsel's recommendation shall be reviewed by one of the two members of the Board assigned for that purpose. If the initial reviewing member of the Board approves Counsel's recommendation, it shall be implemented. If the reviewing member of the Board disapproves Counsel's recommendation, Counsel may request further review by the other reviewing member of the Board. In the event of such second review of Counsel's

recommendation, the decision by the second reviewing member of the Board shall be final. The member or members of the Board who review Counsel's recommendation shall be disqualified in any formal disciplinary proceedings in relation to the same alleged misconduct.

(b) Formal Hearing. Formal disciplinary proceedings shall be instituted by Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the petition shall be served upon the respondent in accordance with Rule 2.11(a). Notwithstanding Rule 2.22, if at the time the petition is served, the respondent is engaged in the act of the practice of law as a part of a firm, partnership, corporation or governmental entity or other group, Counsel shall provide a notice to the respondent's employer of the fact that formal disciplinary proceedings have been filed with the Board. The respondent shall serve his or her answer upon Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Board Chairperson. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chairperson to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect. Following the service of the answer or upon failure to answer, the matter shall, unless the provisions of (d) below apply, be assigned by the Chairperson to a hearing committee or officer. The hearing committee or officer receiving the assignment shall

serve a notice of hearing upon Counsel and the respondent, or the respondent's counsel, stating the date, time, and place of the hearing. At every hearing wherein factual issues are to be resolved, the respondent shall have a full opportunity to confront and cross-examine such witnesses presented by Counsel and to present evidence on his or her own behalf. The hearing committee or officer shall, in every case, submit a report containing findings and recommendations, together with a record of the proceedings, to the Board within 30 days after the conclusion of the hearing. The findings of the hearing committee or officer shall be supported by clear and convincing evidence. The hearing committee or officer shall not be bound by the formal rules of evidence, but shall admit only trustworthy evidence. The hearing committee or officer shall not rely upon any evidence outside the formal record in reaching a decision.

(c) **Review by Board and Supreme Court.** Upon receipt of a report from a hearing committee or officer, the Board shall set the dates for submission of briefs and for oral argument before the Board. The Board shall promptly either affirm or modify the recommendation of the hearing committee or officer, remand the matter for further proceedings before the hearing committee or officer, or dismiss the petition. In the event the Board determines that the proceeding shall be concluded by private or public reprimand, such reprimand shall be imposed, with the consent of the respondent, in accordance with procedures established by the Board. Unless the Board shall dismiss or remand the petition or the matter is concluded by private or public reprimand with the consent of the respondent, the Board shall promptly submit a

report containing its findings and recommendations, together with the entire record, to the supreme court. After the filing of such report, a copy thereof shall be served on the respondent in accordance with Rule 2.11(b). If the respondent objects to the report, then within 20 days after being served with a copy of the report, the respondent shall file an opening brief pursuant to the rule governing civil appeals. Other briefs may be filed and oral argument may be had as therein provided, except that the time for filing of an answering brief shall be 20 days after Counsel has been served with a copy of the respondent's opening brief. Upon conclusion of the proceedings, the court shall promptly enter an appropriate order.

(d) Elimination or Suspension of Hearing Proceedings. All proceedings before the hearing committee or officer shall be eliminated or suspended (1) where the respondent has filed no answer (and the charges have thus been deemed admitted) because, after due and diligent effort by Counsel, the respondent cannot be located for personal service and does not receive registered or certified mail at any of his or her addresses last known to Counsel; or (2) where Counsel and the respondent at any time subsequent to the filing of a petition file with the Board a stipulation setting forth an admission by the respondent of the facts deemed relevant to a determination of the matter, the disciplinary violations which serve as grounds for discipline, and an agreement as to the recommended form of discipline which should be imposed upon the respondent based upon the admitted violations. The entire record in the case shall thereupon

be transmitted directly to the Board for review in accordance with (c) above. The parties may request that the record be supplemented by documentary exhibits. In any event, the Board may accept a request by the parties that the submission of briefs and/or argument before the Board be waived. In the case of a stipulation filed by the parties, neither the Board nor the supreme court shall be bound to accept the parties' stipulated factual and legal agreements or recommended disposition, and the Board or the court may either decide the matter based upon the factual admissions set forth in the parties' stipulation or may remand the matter for further proceedings before a hearing committee as outlined in (b) above.

(Renumbered September 1984; amended March 7, 1986, effective March 7, 1986; further amended September 22, 1988, effective September 22, 1988; further amended July 3, 1989, effective July 3, 1989; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended January 11, 1991, effective January 11, 1991; further amended November 8, 1991, effective November 8, 1991; further amended February 7, 1992, effective February 7, 1992.)

2.8 Immunity. Complaints submitted to the Board or Counsel or testimony given with respect thereto shall be absolutely privileged and no lawsuit predicated thereon may be instituted. Members of the Board, members of the hearing committees, Counsel, staff, volunteers, experts appointed pursuant to Rule 2.19, and trustees appointed pursuant to Rule 2.20 shall be immune from suit and liability for any conduct in the course of their official duties.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended May 7, 1990, effective May 7, 1990.)

2.9. Refusal of Complainant to Proceed, Compromise, etc. Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement, compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint.

(Renumbered September 1984.)

2.10. Matters Involving Relating Pending Civil or Criminal Litigation. Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion, for good cause shown.

(Renumbered September 1984.)

2.11. Service.

(a) Service upon the respondent of the petition or order to show cause in any disciplinary, disability, or trustee proceeding shall be made by personal service by any person authorized by the Chairperson of the Board, except that in the event the respondent cannot be found within the state or has departed therefrom, service shall be made by registered or certified mail at the respondent's address shown in his or her registration statement filed pursuant to Rule 17(d) or other last known address.

(b) Service of any other papers or notices required by these rules shall be made in accordance with Rule 5 of the Hawaii Rules of Civil Procedure.

(Renumbered September 1984; amended July 3, 1989, effective July 3, 1989; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended May 7, 1990, effective May 7, 1990; further amended February 7, 1992, effective February 7, 1992.)

2.12. Power to Subpoena Respondents and Witnesses; Pretrial Proceedings. Any member of a hearing committee or any hearing officer, in matters before it or them, and Counsel, in matters under investigation by him or her, may administer oaths and affirmations, and compel by subpoena the attendance of the respondent and witnesses and the production of pertinent books, papers and documents. A respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents before a hearing committee or officer after formal disciplinary proceedings are instituted. Writs of subpoena shall be issued in blank by the clerk of this court upon application by any member of a hearing committee or any hearing officer, Counsel or the respondent. This court may, upon proper application pursuant to HRAP Rule 27, enforce the attendance and testimony of the respondent and may, as set forth in Rule 2.12A, immediately suspend the respondent from the practice of law for the failure to comply with any lawful demand of this court, hearing committee or officer, or Counsel made in connection with any investigation, hearing, or disciplinary proceedings. Upon application pursuant to HRAP Rule 27, this court may also enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in criminal cases in the circuit courts.

There shall be no discovery proceedings except upon the order of the Chairperson of the Board for good cause shown.

At the discretion of the hearing committee or officer, a conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held before the officer or the chairperson of the committee or any member of the committee designated by its chairperson.

(Renumbered September 1984; amended April 4, 1988, effective April 4, 1988; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.12A. Failure to Cooperate.

(a) An attorney who is the subject of an investigation by Counsel, or who is the subject of a disciplinary proceeding pending before a hearing committee, the Disciplinary Board, or this court, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of a failure to cooperate with the investigation or disciplinary proceeding. Such a finding shall be based upon the attorney's default in responding to the petition or notice filed by Counsel, or the attorney's failure to submit a written response to pending allegations of professional misconduct, or to comply with any lawful demand of this court, the hearing committees, or Counsel made in connection with any investigation, hearing, or disciplinary proceeding, including failure to comply with a subpoena issued under Rule 2.12.

(b) Upon the filing with this court of a petition approved by the Board Chairperson or his or her designee on the Board, an order shall be issued directing the attorney to appear within ten days of the service of the order, and inform the court as to why the attorney should not be immediately suspended. Service upon the attorney shall be made pursuant to Rule 2.11(a). The suspension shall be made upon this court's finding that the attorney has failed to cooperate, as outlined in (a) above. The court shall briefly state its reasons for its order of suspension, which shall be effective immediately and until such time as the disciplinary proceedings before the Disciplinary Board have been concluded, and until further order of this court.

(c) In all cases where the petition described in (b) above is served in any manner other than personally, and the attorney so served does not appear, an application may be made by such attorney to the chief justice at any time within one year after the rendition of the final order of suspension, and upon good cause shown and upon such terms as may be deemed just by the chief justice, such attorney shall be allowed to defend himself against such charges.

(Added April 4, 1988, effective April 4, 1988; amended February 7, 1992, effective February 7, 1992.)

2.13. Attorneys Convicted of Crimes.

(a) Upon the filing with this court of a certificate of a clerk of court demonstrating that an attorney has been convicted (certificate of conviction) of a crime which is, or if it had been committed in Hawaii would have been a

felony or which involves dishonesty or false statement, this court shall enter an order immediately restraining the attorney from engaging in the practice of law, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction. Upon good cause shown, the court may set aside such order restraining the attorney from engaging in the practice of law when it appears to be in the interest of justice so to do. An order restraining an attorney from the practice of law shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless this court shall so order. Upon being informed that an attorney has been convicted of a crime above described. Counsel shall obtain a certificate of the conviction and file the same with the Board and with the clerk of this court.

(b) The final conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him or her based upon the conviction. For purposes of this rule, a judgment of conviction is deemed final when the availability of appeal has been exhausted and the time for filing a petition for certiorari in the United States Supreme Court on direct review of the judgment of conviction has elapsed and no petition has been filed, or if filed the petition has been denied or the judgment of conviction has been affirmed.

(c) Upon the receipt of a certificate of conviction of an attorney of a crime described in (a) above, whether or not the attorney shall be restrained from the practice of

law, this court shall refer the matter to the Board for the institution of a formal proceeding in which the sole issue to be determined shall be the extent of the discipline to be imposed, provided that a disciplinary proceeding so instituted shall not be brought to hearing until the judgment of conviction is final, unless the respondent shall so request.

(d) Immediately upon the filing with this court of a certificate demonstrating that the underlying conviction for a crime has been reversed, any order entered under the provisions of (a) above restraining the attorney from the practice of law shall be vacated, any formal proceeding then pending against the attorney found solely upon such conviction shall be terminated and any discipline imposed in any such formal proceeding shall be vacated, but the reversal of the conviction shall not terminate or affect any formal proceeding previously or thereafter instituted founded upon alleged misconduct by the attorney, whether or not involving the same facts alleged to constitute the crime or offense of which the attorney was convicted.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.14. Disbarment by Consent of Attorneys Under Disciplinary Investigation or Prosecution.

(a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of grounds for his or her discipline may consent to disbarment, but only by delivering to the Board an affidavit stating that he or she desires to consent to disbarment and that:

(1) His or her consent is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting his or her consent;

(2) he or she is aware that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his or her discipline, the nature of which he or she shall specifically set forth;

(3) he or she acknowledges that the material facts so alleged are true; and

(4) he or she submits her consent because he or she knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, he or she could not successfully defend himself or herself.

(b) Upon receipt of the required affidavit, the Board shall file it with this court and this court shall enter an order disbarring the attorney on consent.

(c) The order disbarring the attorney on consent shall be a mater of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court or as otherwise allowed by these rules.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.15. Reciprocal Discipline.

(a) Any attorney disciplined by any foreign or domestic jurisdiction, whether state, federal, or local, has

a duty to notify Counsel promptly of the imposition of that disciplinary action. In addition, the disciplined attorney shall promptly obtain a certified copy of the order imposing that discipline and file it with this court and the Board.

(b) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this state has been disciplined in another jurisdiction, this court shall forthwith issue a notice directed to the attorney containing: (1) a copy of said order from the other jurisdiction; and (2) an order directing that the attorney inform the court, within 30 days from service of the notice, of any claim by the attorney that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor.

(c) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, this court shall impose the identical discipline unless Counsel or the attorney demonstrates, or this court finds that upon the face of the record upon which the discipline is predicated it clearly appears, (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or (3) that the misconduct established warrants substantially different discipline in this state. Where this court determines that any of said elements exist, this court shall enter such other order as it deems appropriate.

(d) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

(Renumbered September 1984.)

2.16. Disbarred or Suspended Attorneys.

(a) A disbarred or suspended attorney shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of his or her disbarment or suspension and his or her consequent inability to act as an attorney after the effective date of his or her disbarment or suspension and shall advise said clients to seek legal advice elsewhere.

(b) A disbarred or suspended attorney shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, each of his or her clients who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of his or her disbarment or suspension and consequent inability to act as an attorney after the effective date of his or her disbarment or suspension. The notice to be given to the client shall advise the client of the desirability of the prompt substitution of another attorney or attorneys in his or her place.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred

or suspended attorney to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(c) Orders imposing suspension or disbarment shall be effective 30 days after entry. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry date of the order and its effective date he or she may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(d) Within ten days after the effective date of the disbarment or suspension order,the disbarred or suspended attorney shall file with this court an affidavit showing: (1) that he or she has fully complied with the provisions of the order and with these rules; (2) all other state, federal and administrative jurisdictions to which he or she is admitted to practice; and (3) that he or she has served a copy of such affidavit upon Counsel. Such affidavit shall also set forth the residence or other address of the disbarred or suspended attorney where communications may thereafter be directed to him or her.

(e) The Board shall cause a notice of the suspension or disbarment to be published in a newspaper of general circulation in the judicial circuit in which the disciplined attorney maintained his or her practice.

(f) The Board shall promptly transmit a certified copy of the order of suspension or disbarment to all judges of the State of Hawaii, and the administrative judge of each judicial circuit shall make such further order as he or she deems necessary to fully protect the rights of the clients of the suspended or disbarred attorney.

(g) A disbarred or suspended attorney shall keep and maintain records of the various steps taken by him or her under these rules so that, upon any subsequent proceeding instituted by or against him or her, proof of compliance with these rules and with the disbarment or suspension order will be available. Proof of compliance with these rules shall be a condition precedent to any petition for reinstatement.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.17. Reinstatement.

(a) No suspended or disbarred attorney may resume practice until reinstated by order of this court except as provided in Rule 17(d).

(b) An attorney who has been disbarred may not apply for reinstatement until the expiration of at least five years after the effective date of the disbarment and shall not be reinstated unless he or she can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements

imposed by the court, which may include successful completion of requirements for passing the bar examination.

An attorney suspended from practice for one year or less who has complied with the suspension order and has paid all required fees shall be reinstated by order of the court at the end of the period of suspension by filing with the court and serving upon Counsel an affidavit to that effect. An attorney suspended from practice for more than one year may not apply for reinstatement until the expiration of at least one-half of the period of suspension. An attorney suspended from practice for more than one year shall not be reinstated unless he or she can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements imposed by the court, which may include the successful completion of requirements for passing the bar examination.

(c) Petitions for reinstatement by a disbarred or suspended attorney shall be filed with the Board and served upon Counsel. Upon receipt of the petition, the Board shall refer the petition to a hearing committee. The hearing committee shall promptly schedule a hearing. At the conclusion of the hearing, the hearing committee shall promptly submit to the Board a report containing its findings and recommendations, together with the record of the proceedings before it. The Board shall review the report of the hearing committee and the record and shall submit a report containing its findings and recommendations, together with the record, to this court, which shall promptly enter an appropriate order.

(d) This court shall direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(Renumbered September 1984; amended September 22, 1988, effective September 22, 1988; further amended February 7, 1992, effective February 7, 1992.)

2.18. (Deleted)

(Deleted February 7, 1992.)

2.19. Proceedings Where an Attorney Is Declared to Be Incompetent or Is Alleged to Be Incapacitated.

(a) Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, this court, upon proper proof of the fact, shall enter an order transferring such attorney to inactive status effective immediately and for an indefinite period until the further order of this court. A copy of such order shall be served upon such attorney, his or her guardian, and/or the director of the institution to which he or she has been committed in such manner as this court may direct.

(b) Whenever the Board shall petition this court to determine whether an attorney is incapacitated from continuing the practice of law by reason of physical or mental infirmity or illness or because of the use of drugs or intoxicants, this court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as this court shall designate. If, upon due consideration of the

matter, this court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status on the ground of such disability for an indefinite period and until the further order of this court. Any pending disciplinary proceeding against an attorney shall be held in abeyance.

This court shall provide for such notice to the respondent attorney of proceedings in the manner as it deems proper and advisable and shall appoint an attorney to represent the respondent if he or she is without adequate representation.

(c) If, during the court of a disciplinary proceeding, the respondent contends that he or she is suffering from a disability by reason of mental or physical infirmity or illness, or because of the use of drugs or intoxicants, which makes it impossible for the respondent to defend himself or herself adequately, this court thereupon shall enter an order immediately transferring the respondent to inactive status until a determination is made of the respondent's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of (b) above.

If this court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) The Board shall cause a notice of transfer to inactive status to be published in a newspaper of general

circulation in the judicial circuit in which the disabled attorney maintained his or her practice.

(e) The board shall promptly transmit a certified copy of the order of transfer to inactive status to all judges of the State of Hawaii and shall request such action under the provisions of Rule 2.20 as may be indicated in order to protect the interests of the disabled attorney and his or her client.

(f) No attorney transferred to inactive status under the provisions of this rule may resume active status until reinstated by order of this court. Any attorney transferred to inactive status under the provisions of this rule shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as this court may direct in the order transferring the respondent to inactive status or any modification thereof. Such application shall be granted by this court upon a showing that the attorney's disability has been removed and he or she is fit to resume the practice of law. Upon such application, this court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed including a direction for an examination of the attorney by such qualified medical experts as this court shall designate. In its discretion, this court may direct that the expense of such an examination shall be paid by the attorney.

Where an attorney has been transferred to inactive status by an order in accordance with the provisions of (a) above, and, thereafter, in proceedings duly taken, he or she has been judicially declared to be competent, this court may dispense with further evidence that his or her

disability has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(g) The filing of an application for reinstatement to active status by an attorney transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of his or her disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since his or her transfer to inactive status and he or she shall furnish to this court written consent to each to divulge such information and records as requested by court-appointed medical experts.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.20. Trustee Proceedings.

(a) Whenever an attorney has been transferred to inactive status because of incapacity or disability, or disappears or dies, or has been suspended or disbarred and has not complied with Rule 2.16, and no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist, this Court, upon proper proof of the fact, shall appoint an attorney as trustee to inventory the files of the inactive, disappeared, deceased, suspended or disbarred attorney and to take such action as seems indicated to protect the interests of that attorney's clients.

(b) Any attorney so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates, except as necessary to carry out this court's order appointing the attorney to make such inventory.

(Renumbered September 1984; amended May 7, 1990, effective May 7, 1990.)

2.21. Administration and Finances. All matters relating to the administration and finances of the Board, including the annual budget provided for in Rule 2.4(e)(7), shall be subject to review by the Board of Directors and ultimate review and approval by the Court.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders.)

2.22. Confidentiality.

(a) General Rule. The files, records and proceedings of the Board, the hearing committees and Counsel, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of an attorney, shall be deemed confidential and shall not be disclosed except under the following circumstances:

(1) As between Counsel, the committees, the Board and the court in the furtherance of their duties;

(2) As between the Board, Counsel and an attorney admission or disciplinary authority, or judicial selection or disciplinary authority, of any jurisdiction in which the

attorney affected is admitted to practice or seeks to practice;

(3) Upon the request of the attorney affected;

(4) Where permitted by this court;

(5) Where required or permitted by these rules;

(6) Where the investigation is predicated upon a conviction of the respondent for a crime;

(7) Where this court enters an order transferring the respondent to inactive status pursuant to Rule 2.19.

(b) The Chairperson of the Board, upon the receipt of trustworthy evidence, may authorize Counsel to disclose an attorney's possible substance abuse, physical or mental illness, or other infirmity to the Director of the Attorneys and Judges Assistance Program.

(c) An affidavit consenting to disbarment submitted pursuant to Rule 2.14 shall be submitted to the hearing committee, to the Board and to this court at any time that the disbarred attorney applies for reinstatement. Such affidavit shall also be supplied to an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice.

(d) In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the respondent, the Board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing

without prejudgment, and to state that the respondent denies the allegations. The statement shall be first submitted to the respondent involved for his or her comments and criticisms prior to its release, but the Board in its discretion may release the statement as originally prepared.

(e) Except as ordered by this court, or as otherwise provided by these rules, the files, records and proceedings filed with this court by the Board, by Counsel or by a respondent, as well as any oral argument held before the court in connection with any disciplinary proceedings, are not confidential. However, where the Board has concluded that the sole discipline should be a public or private reprimand by the Board, and where the respondent has declined to consent to such discipline, the proceedings shall remain confidential pending review by the supreme court, unless and until the court imposes public discipline or the Board imposes public discipline pursuant to a remand by the court. Similarly where the sole discipline recommended by the Board is public censure by the supreme court, the proceedings shall remain confidential unless and until the court imposes public discipline.

(f) In addition, the Board shall transmit notice of all public discipline imposed by this court, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

(Renumbered September 1984; amended November 23, 1987, effective November 23, 1987; further amended November 8, 1991, effective November 8, 1991; further amended February 7, 1992, effective February 7, 1992.)

2.23. Interim Suspension.

(a) If at any time during the pendency of an investigation or a disciplinary proceeding, it appears that the continuation of an attorney's authority to practice law is causing or is likely to cause serious harm to the public, Counsel may request the Chairperson of the Board to appoint three Board members to serve on a committee whose function will be as follows:

(1) The committee will issue an Order to Show Cause to the respondent directing him or her to appear before the committee within five days of the service of the Order to Show Cause upon the respondent. At the hearing on the Order to Show Cause, Counsel shall present evidence and/or witnesses to the committee to substantiate his or her allegations that the respondent's continued privilege of practicing law during the pendency of the disciplinary proceedings is causing or is likely to cause serious harm to the public. The respondent shall have the right to appear at the hearing and to present evidence and/or witnesses opposed to the Order to Show Cause.

(2) After conducting the hearing, if the committee concludes that respondent's authority to practice law during the pending disciplinary proceedings is causing or is likely to cause serious harm to the public, the committee shall enter its findings and direct Counsel to file a petition with this court requesting that respondent's license to practice law be immediately suspended pending the outcome of the disciplinary proceedings.

(3) Upon the filing of such a petition with this court, this court shall immediately enter an order directing the respondent attorney to show cause why he or she should not be placed on an interim suspension. If no good cause is shown, the court shall enter an order of interim suspension which shall remain in full force and effect until further order of the court.

(b) An order imposing an interim suspension on an attorney under this rule shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless this court shall otherwise order.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.24. Audit of Trust Accounts.

(a) When Audit May be Ordered. Upon occurrence of any of the following, the Chairperson may order an audit of any trust accounts maintained by an attorney:

(1) Failure to file the trust account verification required under authority of Disciplinary Rule (DR) 9-102(B)(3) of the Code of Professional Responsibility;

(2) A trust account check is returned for insufficient funds or for uncollected funds, and cannot be satisfactorily explained;

(3) A petition for creditor relief is filed on behalf of an attorney;

(4) Felony charges are filed against an attorney;

(5) An attorney is alleged to be incapacitated under Rule 2.19 of these rules, or has been judicially declared to

be incompetent or has been involuntarily committed on the grounds of incompetency or disability;

(6) A claim against the attorney is filed with the Lawyers' Fund for Client Protection;

(7) Upon court order; or

(8) When requested for other good and sufficient reasons by Counsel, a hearing committee or the Board.

(b) Random Audits. The Board may randomly order audits of trust accounts.

(c) Examination of Other Financial Accounts. Nothing in this rule shall preclude the examination of the other financial accounts of an attorney if the examination of the attorney's trust accounts reveals to the satisfaction of the Chairperson that the attorney is not in substantial compliance with trust accounting requirements.

(d) Cost of Audit. Audits conducted in any of the circumstances enumerated in paragraph (a) or (b) above shall be at the cost of the attorney audited only when the audit reveals that the attorney was not in substantial compliance with the trust accounting requirements. It shall be the obligation of any attorney who is being audited to produce all records and papers concerning property and funds held in trust and to provide such explanations as may be required for the audit.

(Added September 22, 1988, effective September 22, 1988; amended February 7, 1992, effective February 7, 1992.)

2.25. (Deleted)

2.26. Effective Date. These rules shall become effective on July 1, 1974, and any disciplinary investigation pending on that date shall be transferred to the Board, provided that any case then pending with respect to which a formal hearing has been commenced shall be concluded under the procedure existing prior to the effective date of these rules.

(Renumbered September 1984; further renumbered September 22, 1988.)

Rule 13. PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.

Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master, he

shall file with his return a motion therefor supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent him. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with;

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR-6-101 or DR-7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

(Added July 15, 1985, effective July 15, 1985.)